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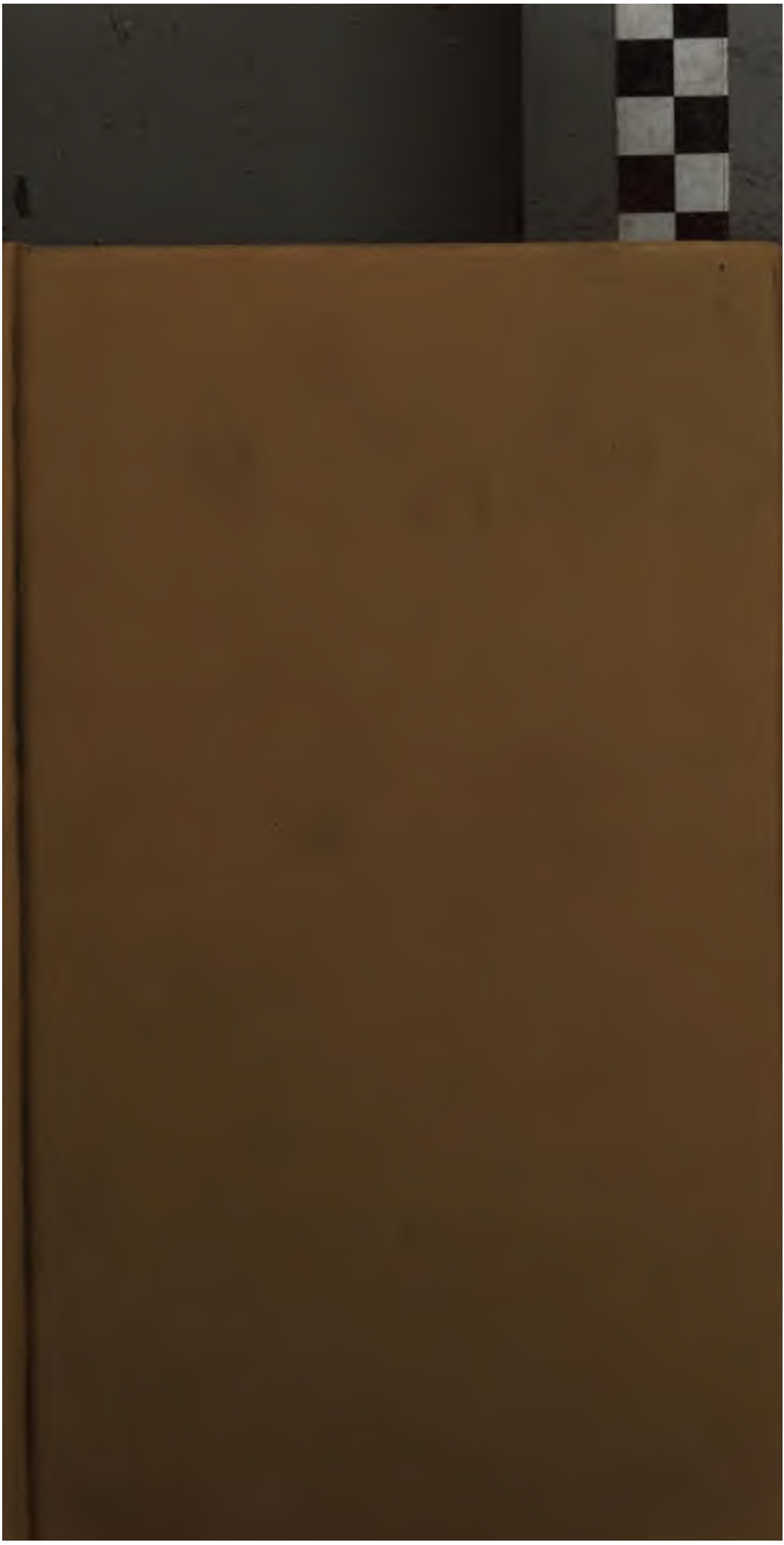
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REPORTS OF CASES.

DETERMINED IN THE

COURT OF CHANCERY,

AND, ON APPEAL, IN

THE COURT OF ERRORS AND APPEALS,

OF THE

STATE OF NEW JERSEY.

JOHN P. STOCKTON, REPORTER.

VOL. I.

TRENTON:
PRINTED AT THE "TRUE AMERICAN" OFFICE.
1856.



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10 JUL 1962

THIS VOLUME contains the opinions delivered in the Court of Chancery, from May Term, 1852, to October Term, 1853; and the appeal cases from March Term, 1853, to June Term, 1855—all inclusive. Also, an Appendix, containing some opinions omitted from the reports of cases prior to the commencement of these reports.

BENJAMIN WILLIAMSON, ESQ., CHANCELLOR.

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CASES

ADJUDGED IN

THE COURT OF CHANCERY,

OF THE STATE OF NEW JERSEY,

MAY TERM, 1852.

BENJAMIN WILLIAMSON, Esq., Chancellor.

Matthias Brakely *v.* Elizabeth Maria Sharp, Henry Sharp, *et al.*

The owner of a large farm lying on both sides of a highway, and through which flowed a stream rising on the part lying above the highway, diverted the water by means of an aqueduct, for the use of his two dwellings, one above, and the other below the road, and so arranged it that at the upper dwelling the whole water could be controlled, and prevented from running to the lower one, and used the water in this manner for twenty-three years before his death. After his death, commissioners were appointed by the Orphans' Court to make partition of his land, and assign dower, who assigned the land above the road partly to his widow, and partly to one of the heirs, and afterwards, by order of the court, sold and conveyed the land below the road, under which conveyance the complainant held, claiming the right to use the aqueduct to the same extent as used by its first owner, upon the ground of adverse possession, and of the conveyance by the commissioners. *Held,*

1. That no adverse possession could begin till the severance of the title by the commissioners.
2. That until such severance no easement could exist in the aqueduct.
3. That by a grant of land, easements necessary for its enjoyment, are created *ex necessitate*, and pass by the grant, although not expressly named.
4. That by the setting off of the land above the road before the sale of that below, there was a severance of the unity of title, and those to whom it was set off took it free from any encumbrance of the easement, to the same extent as if the original owner had conveyed it to them without reserving the easement.

5. That by the commissioners' deed no title to the easement passed, there being no express grant of it, and it not being necessary for the enjoyment of the property; but had it been necessary, and in actual use at the time of the conveyance, then it would have passed, had there been no prior severance of the unity of title.
6. That if a former owner of the complainant's land, holding under the commissioners' deed, had made such expenditures in repairing the aqueduct as would create an equitable right in him to the enjoyment of his expenditures, the right was only personal, and could not be claimed by his grantee.

This was an injunction bill filed October 31, 1851, upon which an injunction issued, and the defendants having answered, a motion to dissolve the injunction was argued at February term, 1852. The facts, so far as necessary to a clear understanding of the case, appear in the opinion of the Chancellor.

Sherrerd and *S. R. Hamilton* for complainant.

Kennedy and *P. D. Vroom* for defendants.

THE CHANCELLOR. Upon the complainant's filing his bill, on the 31st day of October last, an injunction was issued by order of the Chancellor, restraining the defendants from interrupting the flow of water upon the complainant's land, through an artificial channel constructed for the purpose.

The defendants have answered, and ask for a dissolution of the injunction.

The case is, as briefly as it can well be stated, this. Christian Sharp was the owner of a valuable farm of about four hundred acres, situate and lying on the northwest and southeast side of the public road leading from Belvidere to Easton. On the southeast side of the road was his dwelling house, and on the same side a distillery, which he carried on for many years. Running through the northwest part of the farm was a stream of water, taking its rise about three hundred yards above the public road, and losing itself in a farm below Mr. Sharp's.

In the year 1810, he placed bored logs, or wooden pipes, from the head of the stream, and by them conveyed the water, for its more convenient use, to his dwelling house and distillery. In 1813, he erected, on the north side of

the road, a new dwelling house, and so arranged the aqueduct as to supply the new dwelling with water. Near this new dwelling, and on the northwest side of the road, he placed in the pipes a fixture called an upright, with a metalic cock, by which he turned at his pleasure, all the water running through the aqueduct, or let it pass down to the distillery and dwelling house. By turning the cock all the water would be discharged through it at the upright, thence to the public road referred to, thence down the road until it emptied into the natural water course where it crossed the highway.

On the 3d of April, 1826, Sharp conveyed to the complainant one hundred and forty-three acres of land lying on the southeast side of the farm, on which this stream of water, in its natural channel, flowed; and in the deed of conveyance was a covenant, that the grantee might enter upon the lands of the grantor, and clear out the water course, so as to remove any obstructions to its natural flow to the lands conveyed. This covenant has no reference whatever to the artificial water course.

About the year 1835, Christian Sharp died intestate, leaving him surviving, his widow Elizabeth Maria Sharp, one of the defendants, and Henry Sharp, and some others of the defendants in the suit, his heirs at law.

Such proceedings were had in the Orphans' Court of the County of Warren, that the portion of the land lying on the northwest side of the road, and on which was situate the new dwelling house, the aqueduct and spring of water, was assigned, part to the widow for her dower, and the residue to Henry Sharp. Subsequently, by order of the same court, the commissioners, on the 16th day of November, 1837, sold to John Strader and William M'Kinney, that portion of the land lying on the southeast side of the public road.

Through several mesne conveyances, the title to this land sold to Strader and M'Kinney became vested in the complainant. The date of the deed is not given in the pleadings. It must, however, have been subsequent to the third of March, 1842, the date of the deed to his immediate

grantor. I think Cainrel agreed it was dated the first of April, 1851.

The several deeds through which the land passed from the commissioners to the complainant, are in the usual form; and with the exception of that of the commissioners, are deeds with full covenants.

The distillery was abandoned some time before Sharp's death.

The bill alleges, that the water had been used on the premises, now the complainant's, through the log aqueduct, from the year 1810, by Christian Sharp, and by all who have held under him, up to the time it was interfered with by the defendants, on the first day of April, 1851; and that the aqueduct had been repaired during that time, by the owners and tenants of the complainant's land.

The complainant insists that the deeds of conveyance, under which he holds, conveyed to the several grantees all the rights, liberties, privileges, hereditaments and appurtenances, that the said Christian Sharp was seized and possessed of, at the time of his death, and that the flow of water through the aqueduct was a necessary appurtenance to the said farm.

He claims the right to the use of the water when it is not needed on the land above the road, and not exhausted there through the upright for that purpose, and that he has a right to go upon the land of Elizabeth M. Sharp and Henry Sharp to repair the aqueduct. He also claims these privileges by virtue of the possession and enjoyment of those under whom he holds for more than twenty years.

Can the complainant maintain these rights as an easement upon the lands of Elizabeth and Henry Sharp? If so, he must claim this easement by one of two ways, or both—by grant, or adverse possession for twenty years, which implies a grant. To these two modes of acquiring an easement, there has been, by some jurists, added that *by necessity*. As, where a man grants land in the middle of his field—by *necessity*, a right of way to the land granted exists over the grantor's land. But this mode of acquisition may properly

be classed under the head of title, or right, by grant. It flows by necessity from the grant—it is incident to the thing granted. It is the construction put by legal tribunals upon the grant, in conformity to the well established principle of law, that where a man grants a thing he grants with it every thing necessary to its enjoyment. (See note in 1 Saund. Rep. 323.*)

In this case, there can be no pretence of an uninterrupted adverse possession and enjoyment, by the complainant or of those under whom he holds, for a period of twenty years. The titles of the farm now owned and occupied by the complainant, and of that on which the aqueduct is constructed, were united in Christian Sharp. His title descended to his heirs at law, and there was no severance of the title, until the commissioners set off the land above the road to the widow and Henry Sharp, in 1835. Of course, no adverse possession or enjoyment could have commenced until then.

Did the right to this easement pass by the deed from the commissioners to Strader and M'Kinney? If it did, it now vests in the complainant, by the subsequent conveyances, under which he holds his title.

The deed is in the usual form. It is a deed without covenants of warranty; and it conveys all the right, title and interest, in the land of which Christian Sharp died seized, together with all the privileges, hereditaments and appurtenances thereunto belonging.

It was insisted, on behalf of the defendants, that when the title was united in the heirs of Christian Sharp, there could be no such thing as an easement existing as applicable to this aqueduct. This, from the very definition of the term, must be so. An easement is a service or convenience which one neighbor has of another, without profit; as a

* A way of necessity, when the nature of it is considered, will be found to be nothing else but a way *by grant*. It derives its origin from a grant. For there seems to be no difference when a thing is granted by *express words*, or when by *operation of law* it passes as incident to the grant. In the latter case it would be a superfluous and inoperative clause in the deed to convey the incident by express words of grant, being only *expressio eorum quæ tacitæ insunt;* therefore, in both cases the *grant* is the foundation of the title.

right of way, water course, or washing place on another's ground. (Jacobs' Law Dic., title, Easement.)

But although a man can have no easement on his own land, yet by the very severance of the title, and by his conveying a part of the land to another, he may create, *by necessity*, an easement in that part, the title to which remains in him. The familiar case of the man who sells land in the middle of his field, so that there can be no access to it except through the grantor's land, illustrates this: *ex necessitate*, an easement exists the moment he makes the grant, and the grantee has the advantage and convenience of a right of way over his grantor's land. It matters not by what word or words in the grant it is created, or whether we call it an easement by grant, by necessity, or by the operation of law, a court will declare it to exist.

If, while there was a unity of title in the heirs of Christian Sharp, they, or the commissioners appointed by law to divide the estate, (which, as to the principle involved, is the same thing,) had granted the land now owned by the complainant, with the water through this conduit in use at the time, the conduit would have passed by the grant, if necessary for the enjoyment of the property. And it matters not under what particular words in the grant it would have passed, whether under the word appurtenances, or *quasi* appurtenant, or not. Although it did not exist before, yet it would have been created by the grant *ex necessitate*. The principle is the same as that which governs in reference to the right of way referred to. As to what this necessity may be, I would adopt the views of Lord Mansfield in the case of Morris *v.* Edgington, 3 Taunton's Rep. 31, in which case it was decided a right of way was created by the grant, though not in express terms. He remarks, "I say nothing as to what is a way of necessity, I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." In this case of Morris *v.* Edgington, the court say, that no way or other easement can subsist in land of which

there is a unity of possession. Yet their decision in the case was this. A lease demised a messuage consisting of two parts, separated by intervening reserved lands, subjected only to a specific right of way for the lessee to a third building for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land, in one of two directions, the one by entering it from the residue of the demised premises; the other, and far the more convenient, by entering it from a public street; held, that the lessee was entitled to a way across the reserved land from the public street to that part.

In the case of Blaines, lessee, *v.* Chambers, 1 S. & R. 169, the court decided, that by a devise of a mill, with the appurtenances, the right to the use of the water, and the right to the piece of land which was used with the mill passed.

In 5 S. & R., Pickering *v.* Staples, a water right passed by the word appurtenances, which was considered as comprehensive of the water right as if the privilege of using the water had been expressly inserted in the conveyance; even though the vendor declared, when he executed the conveyance, that he neither bought nor sold the water right.

In the case of the New Ipswich Woollen Factory *v.* Batcheldor, 3 N. H. Rep. 190. A grantor conveyed by deed a tract of land, described by metes and bounds, with a mill upon the same; and, at the time of the conveyance, there was a race-way to conduct the water from the mill, running along the side of the natural stream, beyond the land granted, into other land of the grantor, and then discharging the water into the natural stream, and which race-way had been used with the mill several years, and was necessary to the convenience of the mill. It was held, that the right to have the water flow off through the whole extent of the race-way passed as appurtenant to the mill. It was put on the ground of necessity. The Judge says, "the case finds that the race-way was necessary for the convenient working of the mill."



See these cases cited in Angel on Water Courses, 44:— Leonard *v.* White, 7 Mass. 8; 3 Kent, 420; U. S. *v.* Appleton, 1 Sum. 492; Story *v.* Ollin, 12 Mass. 157; Swamburgh, 9 Bug. 305; Compton, 1 Price, 27; Robins *v.* Barnes, Hob. 131; 1 B. & P. 374 (note); Grant, 17 Mass. 443; 1 Sum. 503; Hewlin, 7 Dowl. & Ryl. 783; S. C., 5 B. &. C., 221; Bulst. 339.

In the case of Johnson *v.* Jordan, 2 Metcalf, 234, where a similar question arose. Ch. J. Shaw says, it is a matter of contract, and must depend entirely upon the construction of the conveyance, and then the question recurs what construction the court will put upon a conveyance, when the intention of the parties in this respect is not expressed in terms. He concludes it must be governed by the well settled rule of construction, that the grant of any principal thing shall be taken to carry with it all that is necessary to the beneficial enjoyment of the thing granted, and which it is in the power of the grantor to convey.

10 S. & R. 63, Strickler *v.* Todd. By conveyance of a mill, the whole right of water enjoyed by the grantor as necessary to its use, passes along with it as a necessary incident.

Shepherd's Touchstone, 89, says, by the grant of mills, the waters, flood-gates, and the like that are of necessary use to the mill do pass.

Now, in these cases cited, no easements existed prior to the grants. None were expressly created by the grants; but they were necessary to the beneficial enjoyment of the thing granted, and the law created them. They were within the intent of the parties, and passed as incident to the thing granted.

Comyn's Dig. vol. 4, under title Grant, E. 11, what as incident? So by the grant of any thing *conceditur, et id sine quo res ipsa haberi non debet:* as if one grants his trees, the grantee may enter upon his lands for the cutting down and carrying them away, E. 9. By a grant *cum pertinentiis.* By the grant of a messuage *cum pertinentiis*, a conduit, with water pipes to it, enjoyed any time, passes. So in Bacon's Ab. title Grant, 4. Both Bacon and Comyn refer to the

case of Nicholas v. Chamberlain, 2 Croke's Rep. 121, where it was held by all the court upon demurrer, that if one erect a house, and build a conduit thereto, in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or all the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary, *et quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require. So it is if a lessee for years of a house and land erect a conduit upon the land, and after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and pipes, and liberty to amend them. See also case of Archer v. Bennett, 1 Levinz's Rep. 181.

Whether, therefore, by the grant the easement passes, will, I think, depend upon the question, whether it is necessary for the enjoyment of the thing granted, unless by express terms it is embraced in the grant, or unless according to the technical definition of the term appurtenances it is appurtenant to the land.

Let us apply the principle to the case in hand. It appears by the bill itself, that the main object of the conduit was for the convenience of the dwelling house on the land of Maria and Henry Sharp, and that Christian Sharp himself, and those who have since held under him and occupied that dwelling, always used the water, in part, or the whole of it, at their pleasure, and without any reference to the buildings on the complainant's land. It is true, the use of the water thus conveyed is shown to be of convenience to the complainant, but by no means to approach that *necessity* referred to in the cases cited. The natural water course, from the head of which the pipes are laid, runs through the complainant's land, and not far distant from his dwelling and other buildings; and it does not appear but that he may have the same benefit of the water for all the purposes for

which it is required, without receiving it through the artificial channel in question.

But again. Although there was a unity of title to both tracts of land, in the heirs of Christian Sharp, it was severed when the commissioners set apart that portion of it on the northwest side of the road to the widow and Henry Sharp. Their rights, and the incumbrances upon the land assigned them, were the same precisely, as if Christian Sharp had conveyed the land to them in his life time. Now, if Christian Sharp, in his life time, had conveyed to the defendants the lands they now hold, would he have had the easement now contended for, unless he had expressly, in his deed to them, reserved it? None of the cases referred to go this far, unless the one in 2 Croke. But I think, in such case, Christian Sharp could not have claimed the easement; and for the reason that no man shall derogate from his own grant. And in the case of Swansborough v. Coventry, 9 Bing. 305, the C. J. remarks, that upon this principle it is well established by the decided cases, that where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land, so as to obstruct or intercept the enjoyment of those lights. When, therefore, the commissioners assigned this land to the widow and Henry, they took it free from any such incumbrance as that now claimed; and the other heirs, in whom remained the title to the land on the southeast side of the road, or their grantees, could not claim the easement now set up by the complainant.

Independent of this view of the case, there is nothing in any of the matters set up by the complainant, which gives him any equitable claim to the interference of this court.

Admitting the fact, that Hopeful Hepburn, while he owned the land now of the complainant, repaired the conduit; at

best, it was but a license which was revocable at pleasure; or if the expenditures made by him were of such a character as would create an equity entitling him to the enjoyment and benefit of his expenditures, it attached only to him personally, and cannot be claimed by his assigns. (See cases cited in 2 vol. Am. Leading Cases, 736.)

But the bill itself alleges, that Hopeful Hepburn relaid the pipes, with the *consent* of Elizabeth Maria Sharp and Henry Sharp. If it was with their consent, surely he or his grantees cannot take advantage and make use of that consent, as an evidence of an existing legal right.

The complainant can claim nothing under the idea, that a valuable consideration was paid for the right now claimed by Strader and M'Kinney when they purchased of the commissioners. It is not alleged that they supposed they were purchasing any such right; and the answer states, that in order that no misapprehension might exist, one of the commissioners, on the day of sale, requested that the water might be shut off from the pipes leading to the complainant's land—that it was in fact shut off, and was not running there on that day.

It is incidentally mentioned in the bill, that by drawing off the water at the fixture called the upright, by which its flow through the pipes to the complainant's land is prevented, it commingles with the drippings from the barnyard, runs down the public road, and emptying into the main channel, so corrupts the water as to render it unfit for use on the complainant's land. The complainant has a right to the flow of the water through the natural channel, subject to such use of it by the defendants, Elizabeth and Henry Sharp, as not to deprive the complainant of its benefits. But the bill is not framed for protection in such a case.

It appears that Butler Thomas and William S. Creveling, two of the defendants, have no interest in the land on which the easement is claimed—that they were the active individuals in taking up the logs, and interrupting the flow of the water. They admit they were volunteers, and acted

without authority from any one, and the other defendants deny ever having authorized them to commit the acts complained of.

The injunction as to Thomas and Creveling is retained, and as to the other defendants, let an order be made dissolving the injunction.

WILLIAM A. BREARLEY *et al. v.* MARY ANN BREARLEY *et al.*, Executrix and Executor of SAMUEL BREARLEY.

Where a testator gave to his wife absolutely a provision in real and personal estate, and also an annuity of $400 during life, to be paid by his executors, and then empowered the executors to sell the residue of his real estate, and to rent it till sold, directing them to invest the proceeds of the sales of real and personal estate, and all moneys received by them from any other source, until needed for carrying into effect the provisions of the will, and then gave to each of his two children $500, to be paid out of the first moneys in hands of the executors, after paying debts, funeral expenses, and providing for the bequest to his wife, and then directed the residue of personal estate remaining in the hands of the executors at his wife's decease, and all the real estate then remaining unsold, to be divided equally between his two children, and the personal estate being more than sufficient to pay the debts, expenses, legacies, and provide for the annuity. *Held,*

1. That the children were not entitled to the surplus of the personal estates till after the death of the wife.
2. That the executors had a mere naked power to sell so much of the real estate as might be necessary to answer the specific purposes of the will, but no interest in the land itself, and that the title thereto, at the testator's death, vested in his two children as heirs at law.
3. That there being sufficient personal estate to pay debts, expenses, legacies, and provide for the annuity, the executors had no further power over the real estate, and must account for the rents received, and the proceeds of land sold, before filing the bill.
4. That the rents and proceeds of sales of the real estate, did not, by the doctrine of conversion, become personal estate in the hands of the executors.
5. That where the intention of the testator violates no principle of law or morality, it is the only guide in giving effect to a will, notwithstanding it may be unreasonable, and where the intention is clear, the situation of the testator, or of his family, or property, will not be taken into consideration, but where taking the whole will together, the intention is not clear, such a construction will be adopted as will relieve against a hardship, and lead to a just and proper result.

This bill was filed to obtain a judicial construction of a will.

The facts of the case, so far as necessary for its clear understanding, appear in the opinion of the Chancellor.

Messrs. *Beasley* and *P. D. Vroom* for complainants.

Messrs. *Lanning* and *W. Halsted* for defendants.

THE CHANCELLOR. Samuel Brearly, late of the city of Trenton, deceased, by his last will and testament, bearing date the 25th day of September, A. D., 1846, made the following disposition of his estate:—

First. He ordered the payment of all his debts and funeral expenses as soon as convenient after his decease.

Second. He gave to his wife Mary Ann, in fee simple, his house and lot of land, in Trenton, where he resided at his decease, in lieu of dower.

Third. He gave to his said wife all the furniture and household goods, and his library, as the same were in his house at his death.

Fourth. He gave to his said wife the annual sum of $400, to be paid to her by his executors, in quarterly payments of one hundred dollars each, from the time of his decease, during the term of her natural life.

The fifth clause is in these words, "It is my will, and I do hereby for that purpose, authorize and empower my executors hereinafter mentioned, to sell all my estate, both real and personal, excepting such parts thereof as are disposed of, either at public or private sale, as they may deem adviseable —the said real estate to be rented at their discretion, until such time as a fair price can be obtained for the same, or any part thereof, and when the same, or any part thereof, shall be sold, to make, execute and deliver unto the purchaser or purchasers thereof, good and sufficient deed or deeds of conveyance in fee simple for the same. And I do further devise and request my said executors, that all the moneys arising from the sales of my real and personal estate, or which shall come to their hands from any other source or sources whatsoever, shall be placed at interest on good freehold security, at the discretion of my executors, until such time as the same, or any part thereof, shall be needed for the purpose of carrying into effect the provisions of this my last will and testament."

Sixth. He gives to his daughter Eliza Ann English, wife of Thomas R. English, and to his son William Armstrong Brearley, the sum of five hundred dollars each, to be paid them by his executors, out of the first moneys they shall have in hand, from his estate, after paying his debts and funeral expenses, and providing for the bequest in favor of his wife.

The seventh clause of the will is in these words, "It is my will, and I do hereby order and direct, that the residue of my personal estate remaining in the hands of my executors at the decease of my wife Mary Ann, and all my real estate which shall remain unsold at the time of her decease, shall be equally divided between my said daughter Eliza A. English, and my son William Armstrong Brearley, share and share alike."

And he appoints his said wife executrix, and Isaac W. Lanning executor of his said will.

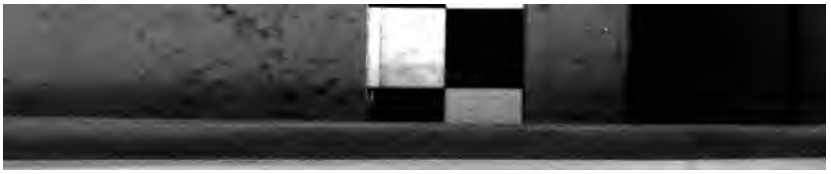
The bill is filed by the two children named in the will, William A. Brearley and Eliza Ann English, and by Thomas English, the husband of Eliza Ann.

The object of the bill is to obtain a judicial construction of the will.

The complainants insist, that after payment of the legacies, and appropriating a fund sufficient to secure the payment of the annuity to the widow, they are entitled at once to the residue of the real and personal estate; and they further ask, in case the court should be of opinion they are not now entitled to this residue, that the executor and executrix may be decreed to pay them the interest on the said residue, at such times as the same shall arise, and in such manner as shall be deemed right and equitable.

The defendants have answered the bill, and they insist that the complainants are not entitled to any part of the estate, except their said legacies of $500 each, until the death of the executrix, the testator's widow. The case is submitted upon the bill and answer.

It appears by the pleadings, that the said William and Eliza are the only children, and heirs at law of the testator; that immediately upon the testator's death, the executor and



executrix possessed themselves of the personal estate; that since that period they have collected the rents and profits of the real estate, and have sold a small part of the real estate, the proceeds amounting to four hundred dollars; that they have paid the specific legacies and debts, amounting to three thousand nine hundred and sixty-nine dollars and nineteen cents; that the personal estate is valued at about seventeen thousand dollars, and the real estate at about eighteen thousand dollars.

It was argued by the complainants' counsel, that there is nothing in the situation of the testator's property, nor is any thing disclosed or suggested in the circumstances or character of his children, to suggest the propriety of postponing the enjoyment of their large portion of this estate, until the death of the widow.

They are his only children, and heirs at law. He intended they should have the bulk of his estate, and yet by such postponement, they take it upon the happening of an event, which may not occur during their life time. The widow is the step-mother of these children, and of middle age. The testator did not intend to place his daughter Eliza's share beyond the reach of her husband, nor was it any want of confidence in his son that induced him to make such a postponement. This is apparent from the consideration, that his widow's death might have followed soon after his own, and yet he makes no provision to place the property, in such an event, beyond the immediate control of his son, or son-in-law. In other respects, the testator seems to have disposed of his property in a manner which is reasonable and unobjectionable; and liberal towards those for whom he was bound to provide.

But, however unreasonable in any respect the will may be, it is the will of the testator we must execute. If it violates no principles of law or morality, the testator's intention must be our only guide in giving effect to it. We cannot alter it for the purpose of making it more liberal or just, according to our estimate of liberality and justice.

If the language is not ambiguous, and the intention is sig-

nified by apt words and phraseology, there is no room for construction. It is not proper for the court first to determine what the will ought to be, and then exercise its ingenuity in producing such a result. The testator has the right, by law, to dispose of his property arbitrarily, and without giving reasons for the disposition he makes of it. If there was any ambiguity of language or phraseology, to make it doubtful what the intention of the testator was; the absence of all motive apparent on the face of the will, or derived from the situation or circumstances of his family, to induce him to make such such a postponement, would be entitled to great weight in controlling the construction. But if no such ambiguity exists, it is not entitled to any consideration.

The complainants insist that by a fair construction of the will, the debts and legacies having been paid, and a fund approriated sufficient to secure the widow's annuity, they are entitled now to all the estate, real and personal, except that fund—that when the testator directed, in the seventh clause of his will, the *residue* of his estate to be equally divided between his two children on the death of his widow, the word *residue* referred to the particular fund appropriated for the annuity, and which necessarily must remain in the executors' hands, until the happening of that event.

In support of this construction, the phraseology of the fifth clause of the will is relied on.

This clause directs the executor and executrix to sell all the real and personal estate not specifically disposed of—to rent the real estate until such time as a fair price can be had for it —to sell and give deeds for it, at their discretion, or any part thereof—and to place out all monies arising from such sales of his real and personal estate, or which shall come to their hands from any source whatever, at interest, on good freehold security. Then follows this language—"at the discretion of my executors, until such time as the same, *or any part thereof*, shall be needed for the purpose of carrying into effect the provisions of this my last will and testament." It is argued, that the words, "*or any part thereof*," plainly indicate that the testator had in view the provisions of his

will, which required only a part of his estate, and consequently did not refer to the final distribution of his property, when not a *part* only would be wanted, but the whole residue, for the purpose; that if a part only of the proceeds of such sales of the real and personal estate should be needed for the annuity, the specific legacies and debts—the directions to the executors being to rent, sell and invest, until such time as the whole, or any *part*, should be wanted to answer the purposes of the will—when a *part* answers these purposes, the complainants are entitled to the residue.

This is a very critical argument. I think it is satisfactorily answered, by a reference to the fact, that in the next clause of the will, the testator gives to his son and daughter each a legacy of five hundred dollars, and the time when they are to receive it, and the circumstances under which it is to be paid, (for it is after all the bequests and legacies are secured and paid,) is the very time, and under the exact state of things, when, and upon which, they would be entitled, upon the construction insisted, to the whole of the residue, real and personal. The testator directs these legacies of five hundred dollars each, to be paid them, after his debts are paid, and after provision has been made for the annuity in favor of his wife. If he intended they should have at that time the whole residue of his estate, except the annuity fund, amounting to upwards of $20,000, how is this particular bequest to them accounted for, and reconciled with such intention?

But it is further argued, that the testator, when he orders and directs the residue of his estate, at the death of his wife, to be divided between his son and daughter, the *residue* referred to is the fund appropriated by the executors to secure the annuity to the widow.

If this is so, then the testator died intestate as to more than one half of his estate. The whole estate is estimated at thirty-five thousand dollars. The legacies amount to about fifteen hundred dollars, and the debts and expenses say four thousand dollars. Taking a fund of eight thousand dollars to secure the annuity, and there is upwards of twenty thousand dollars of the estate undisposed of by the will.

And again, the testator defines this residue which is to be divided at the death of his widow, to be the personal estate in the hands of the executors at her death, and all the real estate remaining unsold. He meant then something more, by the *residue*, than the fund referred to.

But I have taken a view of this will, which is satisfactory to my mind and will afford the complainants some relief, and which, I think, is in accordance with the general intent of the testator.

This is one of those cases, in which a court will anxiously look for something, affording an opportunity to relieve against a hardship, which, it is scarcely possible to suppose, was foreseen or contemplated by the testator at the time of making his will. I do not mean to be understood as intimating that mere straws should be caught at, or any thing affording a mere apology, for the purpose of granting such relief; but where there is any solid foundation upon which we can reasonably rely to justify a construction which will relieve the hardship, and which is not in opposition to the declarations of the testator, but rather is consistent, and harmonizes with the general tendency and design of the will, and leads to a result which commends itself by its justice and propriety, a court of chancery or law, will not hesitate to avail itself of the opportunity thus afforded of doing what is consonant with equity, and not opposed to the principles and policy of the law.

There are three objects of the testator's bounty—his wife and two children. For his wife he provides first, and liberally, and all the residue of his estate he designs for his children—one of them a daughter married, and the other a son, upwards of twenty-one years of age. What he gives to his wife, he places in her hands, and at her disposal immediately. What he designs for his son and daughter—an estate amounting to upwards of twenty-five thousand dollars, consisting of real and personal—it is insisted is, by his will, committed to the possession and control of their step-mother and a stranger, for no other purpose than merely to accumulate, exposed in the mean time to great expense and risk, and at the step-

mother's death to be divided between the two children. What motive the testator could have had, under the circumstances, so to dispose of his property, and who it was he intended to benefit by such disposition, it is difficult to conceive. It exposes the estate to great danger of loss, and incurs a heavy expense to be borne by those whom the testator felt, as his children, were entitled to the greater portion of his property.

Is such the destination of the property by the will?

It will be observed that the testator makes no devise of his real estate at his death. He authorizes his executors to collect the rents, and to sell the real estate, and what is left unsold at his wife's death, to be divided equally between Mrs. English and his son William.

It has been a subject of very much discussion, in what cases executors take a fee simple in trust to sell under a will, or are invested merely with a power of disposition. The distinction resulting from the authorities seems to be this; that a devise of the land *to executors to sell* passes the interest in it; but a devise that *executors shall sell the land*, or that *lands shall be sold by the executors*, gives them but a power. (1 Williams on Ex. 413.)

Sagden on Powers, 111, upon an examination of all the cases concludes, that even a devise of land, *to be sold by the executors*, without giving the estate to them, will invest them with a power only, and not give them an interest.

The case before us is free from all doubt. There is no devise to them of the estate; a mere naked power to sell is given them.

Nor does the power given them as to the rents and profits carry any interest in the land.

By a devise of the occupation, or of the rents and profits of the land, the land itself is carried to the devisee. Such a gift of the rents and profits, or of the occupation of the land, is considered as a mere circumlocution to express the thing itself. (1 Roberts on Wills, 461.)

But here is no devise of the occupation, or of the rents and profits. The power of the executors to take the rents

is only by implication. The language is, "the said real estate to be rented at their discretion, until a fair price can be obtained for the same." As the power to rent implies the power to collect the rents, the executors possess the power of collecting; but it will be seen the interest given them in these rents and profits, is very far from conferring upon them any title to the land.

The title to his real estate, at the testator's death, vested in William A. Brearley and Eliza Ann English, two of the complainants, as his heirs at law. They are in by descent, and if the executors can enter upon the heirs by descent, it is only by the will, and to execute a power conferred upon them, to answer some specific purpose expressed by the testator. For, suppose the testator had conferred upon the executors a power to sell, designating no purposes for which such sale should be made, the executors would not be authorized, under this power, to disturb the heirs in their inheritance. If we find them, in the further examination of this will, and the case presented by it, that there are no purposes of the testator to be answered by a further sale of the real estate, the power of the executors over it is at an end.

The executors are authorized by the will, to take the rents and profits, and sell the real estate, and the proceeds to apply for the purpose of carrying into effect the provisions of the will. After such purpose is answered, the residuary real estate, if not otherwise disposed of by the testator, the heirs take by gift of law, and not in consequence of the testator's intention.

What are the provisions of the will, to carry which into effect, these executors have a right to enter upon the inheritance of the heirs, and deprive them of it?

The annuity is provided for by the fund set apart by the executors, and the executors have in their hands a large personal estate, abundantly sufficient to provide for any deficiency which might be occasioned by accident in the fund. The debts and legacies are all paid. For what purpose will the executors sell this inheritance which the law has cast upon those heirs?

It is not pretended, that there is any specific purpose pointed out by the testator; but the will having given the executors the power to sell the real estate, and then subsequently directing the residue of the estate to be divided between the testator's son and daughter, upon the death of the widow, it is insisted that the executors may exercise their power of sale, merely to hold the proceeds, and pay them over upon the happening of the event alluded to.

With regard to the personal estate, it will be seen, *that* stands on a very different footing. The executors have got that into their possession. They have a right to the possession of it as the representatives of the testator. But to exercise the power over the real estate, they must invade the rights of others, and divest these complainants of a title which is theirs, not by the intention of the testator, but by gift of law.

Let us now examine the residuary clause of the will, and see what it embraces.

The testator does not direct, that upon the death of his widow, *all* the residue of his real and personal estate shall be equally divided between his children. But "the residue of my personal estate remaining in the hands of my executors at the decease of my wife Mary Ann, and all my real estate which may remain unsold at the time of her decease."

What is to become of the rents and profits of the real estate, and the proceeds of sale? They are not embraced in this residuary clause, unless by *conversion*, the real estate, by the exercise of the power of sale by the executors, becomes personal property. And this depends upon the inquiry involving the very nice and intricate doctrine of *conversion*.

If in pursuing this inquiry we should come to the determination, that the rents and profits, and the proceeds of the sale of the real estate do not become, by the doctrine of *conversion*, personal estate in the hands of the executors, but belong to the heirs at law, and not to the next of kin; it will follow that these complainants are entitled to such rents and proceeds at once: because, not being embraced in the residuary clause, and not being otherwise disposed of by the

will, there is no pretence that the enjoyment by them of this property is postponed until the widow's death. And it will follow further, that being entitled to the rents and profits, and the proceeds of the sales, upon the principle that the real estate would not take the character of personal property by being changed into money, they are entitled to the real estate itself, and that the executors have no right to disturb them in the enjoyment of it.

Did the testator, by empowering his executors to sell his real estate, intend it as a conversion? This is a question of intention, to be determined from the language of the will—the particular situation of the testator's property—the character of the devisees and legatees, and all other circumstances which were apparently operating upon the testator's mind influencing him in disposing of his property.

The testator has shown no intent, that he meant to dispose of his real as personal estate. There is no apparent motive, to which we can ascribe an intention to change the nature of the real fund. The manner in which the power and control of the executors over the real estate is conferred upon them, is a circumstance against such intention. It is another circumstance, that the very individuals who take the whole residue are his heirs at law. If there is a conversion it is for some purpose the testator had in view. It was not for the convenience of distribution, for he contemplates the possibility of some of the real estate remaining unsold, and *that* he directs to be divided, without its being converted into personal estate. And besides, suppose the death of his widow had followed the day after his own, the whole real estate would have been divided between these two children. The real estate then was not ordered to be sold for any such purpose. In the case of Smith *v.* Claxton *et al.*, 4 Mad. Ch. Rep. 493, the Vice-chancellor says:—Where a devisor directs his land to be sold, and the produce to be divided between A and B, the obvious purpose of the testator is, that there shall be a sale for the convenience of division. But it is very evident, in this case, the testator had no such object in view. Did he intend the property to be converted, that it



might accumulate in the hands of his executors, for the ultimate benefit of those for whom he designed it? His daughter was married, and his son of age; and certainly it was a very precarious mode of disposing the property to accumulate for their advantage, to place it in the hands of their step-mother, and of another in no wise of kin to them.

The blending and disposing of the proceeds of the real with the personal estate, have been constantly considered to afford an argument for the complete conversion of the real estate into personal, but that circumstance is not conclusive. (1 Roper on Leg. 356.)

It must still depend upon the intention of the testator, and thus every case must rest in a great measure upon its peculiar circumstances.

In Mallabar *v.* Mallabar, Talbot's Cases, 78, cited as Forrester's, it was determined the blending and disposing of the real and personal estate amounted to a conversion. But that case was very different from the one in hand. The testator devised all his messuages, land and heriditaments whatsoever to one sister, her heirs and assigns forever, upon trust, to sell the same as soon as convenient, and out of the proceeds to pay the debts, and then certain legacies, and among which was one to the heir at law. The rest and residue of his personal estate he gave to his sister, the executrix. The question arose between the executrix and the heir at law; the heir insisting that there was a resulting trust for his benefit after the debts and legacies were paid. But the Lord Chancellor determined the whole residue went to the executrix. But there was the circumstance that out of this very fund a personal legacy of five hundred pounds was paid to this very heir; and then again it was argued, that if it should be construed to be a resulting trust for the heir, the testator's intent would be utterly defeated; for then the personal estate must be first applied in case of the real; and so the executrix would have but a troublesome affair, without any benefit or consideration, which could never be the testator's intent.

And there is this marked difference between that case and this. The whole of the estate was to be sold and converted

into one fund, showing that the testator meant, at all events, that the whole estate should be sold and converted. But in this case, as before remarked, the death of the widow might have prevented the sale of one foot of it, and as long as she lives, the discretion is left with the executors to sell, or not, as they may see fit. The blending of the real and personal estate was to create a charge upon the real estate, in aid of the personal, to answer the special purposes of his will, and not with any intention of thereby changing the real into personal estate.

Where a testator gives his real and personal property in trust, to be sold for particular purposes, and does not specifically dispose of the surplus proceeds, but makes a general residuary bequest of his *personal estate*, such a disposition will not include the produce from the sale of the land, in the absence of a contrary intention expressed or inferred from the will, and for this reason: the surplus of the real estate is not made personal; it therefore does not fall within the terms of the bequest. The conversion of the lands into personalty is merely to answer particular purposes, which, when performed, the residue continuing land, and being undisposed, of necessity results to the heir. (1 Roper on Leg. 352.)

In the case before us, not only is there "an absence of a contrary intention expressed or inferred from the will," but the residuary clause, in connection with the context, shows, I think, that the testator had in contemplation, when he spoke of the residue of his personal estate in the hands of his executors, that same estate which he had spoken of and referred to, as his personal estate, in other parts of his will.

In Robinson *v.* Taylor and others, 2 Brown's Rep. 589, the testator gave his real and personal estate in trust—the real to be sold and proceeds invested with the rents and profits thereof; and the question arose whether there was a conversion of real into personal estate. It was decreed that the heir at law should take the proceeds of the real, and the next of kin that of the personal estate.

In 2 Ves. Jr. 271, Chilty *v.* Parker. Mrs. Chilty devised her real estate to be sold, and all her estate to be converted

into money, " which I give and devise as follows." She then gave several legacies. The purposes of the will were all satisfied without having recourse to the real, which was not sold. The next of kin claimed against the heir. It was argued that all the legacies were given with reference to the general fund directed to be created, and that the testatrix must have supposed that fund might probably be exhausted by the legacies, or nearly so. The Lord Chancellor says, " It is agreed on all sides, that the court is not to execute the will *in toto*, that the real is not to be converted into money in order to have the quality of money, and to go as money. Here is the real estate of the testatrix. The heir, if there is nothing to prevent, takes that. If there is a single person existing, who has a right by gift from her to any part of it, or the use of it, that person has a right to apply to have it converted into money. There is no such person existing; but the next of kin comes and says, it is better for his interest to convert it against the heir. There is no spark of equity between the next of kin and the heir; but the general principle is, that the heir takes all that which is not for a defined and specific purpose given by the will."

In this case the title is in the heirs. The debts and legacies have all been paid—the annuity to the widow is secured —every purpose the testator had in view has been answered. Who is there then that has any right to apply to have this estate converted into money? For whose benefit? To answer what purpose of the testator? Who is interested in the real estate, or proceeds, but the heirs themselves? There is no clashing of interest here between the heirs on one side, and the next of kin on the other. Must the estate be converted into money, and to have the quality of money, for the purpose merely, if a sale will affect it, of postponing its enjoyment by those who are entitled to it, to some future, uncertain period?

My conclusion is this, that the executor and executrix have only a power under this will to sell so much of the real estate as is necessary to answer the specific purposes of the will—that those purposes are the payment of the debts and

legacies and the security of the annuity to the widow—that if the personal estate is sufficient for these purposes, the executor and executrix must account to the complainants for such sales of the real estate as they have made and such rents and profits as have come to their hands, and that the executors, under the residuary clause of the will, have the right to retain all the surplus of the personal estate until the widow's death.

Let it be referred to a master to take the accounts of the executor and executrix. Let any further decree be postponed until the coming in of the accounts, that the court may judge, with more certainty, whether the real situation of the estate is such that the purposes of the testator may be answered, with the view taken of the case.

I trust the view I have taken will be satisfactory to the parties. The defendants ought to be satisfied. It leaves upwards of $11,000 in their hands to secure the widow's annuity, and relieves them from the burthen and responsibility of taking charge of the real estate. No one has any interest in *disturbing* the heirs in the enjoyment of the real estate, and with the state of things as they exist. I do not believe it was the intention of the testator they should be disturbed.

JONATHAN HUNT *et al. v.* RICHARD FIELD *et al.*

A general creditor having no specific lien on his debtors property, has no right to interfere with any disposition his debtor may make of it, but an attaching creditor has such a lien as will enable him to maintain a suit in Chancery to set aside as fraudulent, conveyances or judgments under which the property attached is claimed.

A bill for that purpose should be for the benefit of the complainant, and such others of the creditors as should come in and seek relief by and contribute to the expenses of the suit, and should allege for what amount the attachment was issued, that it was executed, and what property was attached, and should make the defendant in attachment a party.

This was an injunction bill to set aside as fraudulent, certain confessed judgments and a conveyance of personal property, and to restrain the defendants from selling or disposing of the property conveyed and levied on. An injunction was granted, and a motion to dissolve argued at February term, 1852. The facts of the case sufficiently appear in the opinion of the Chancellor.

Messrs. *Hoxsey* and *A. Whitehead* for the motion.

Mr. *Barkalew* for the complainants.

THE CHANCELLOR. One Samuel Schoonmaker was carrying on a mercantile business at Paterson, in Passaic county. Prior to the 27th day of January last past, he conveyed all the goods and merchandise in his store to the defendants, Slawson, Barret & Co., a firm doing business in New York. He also confessed a judgment to the said firm in the Passaic Pleas for the sum of $1,368 16. Prior in point of time to this conveyance and judgment, the said Schoonmaker had confessed in the same court a judgment in favor of others of the defendants, Field, Merritt & Co., of the city of New York, for the sum of $3,737 35. The goods were delivered

under the conveyance mentioned, and executions were issued upon the judgments, levies made, and the property advertised for sale by the sheriff.

On the twenty-seventh day of January last, the complainants caused a writ of attachment to be issued out of the Circuit Court of the county of Passaic, against Schoonmaker as an absconding debtor.

The complainants have filed this bill, alleging the conveyance of the goods, and the judgments confessed, to be fraudulent, and praying an injunction against the sheriff and the rest of the defendants, restraining them from selling, or otherwise disposing of the goods, and that the conveyance and judgments confessed to the defendants, may be decreed null and void for fraud.

It is well settled, that a general creditor, having no specific lien on the debtor's property, has no right to interfere with any disposition his debtor may see fit to make of it. Edgar *v.* Clevenger *et al.*, 2 Green's Ch. Rep. 258–464; 1 Green's Ch. Rep. 258, and note to the case.

But the complainant in this case insists, that he has by virtue of his attachment, such a lien as a court of equity will recognize, in order to give him a standing in the court, to question the disposition of the debtor's property.

By the attachment act, the sheriff is commanded to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements, of such debtor, wheresoever they may be found, and it is declared, that the writ shall bind the property and estate of the defendant so attached from the time of executing the same.

The act declares, that the personal property attached shall remain in the safe keeping and care of the officer, in order to answer and abide the judgment of the court, unless the garnishee shall give bond for its forth coming. It provides, that where the garnishee denies having any property of the debtor in his possession, or of his being indebted to him, the plaintiff in attachment may, under certain circumstances, institute a suit at law against the garnishee, which shall be continued

by the court until the action against the defendant in attachment shall be adjudicated upon and determined.

The act in these and in various other ways, has given every facility to the plaintiff in attachment, to reach and secure the debtor's property both real and personal. And to the auditors appointed by the court, from which the attachment may have issued, extraordinary powers are given, to examine the wife of the defendant, and other persons, under oath, touching all matters relating to the trade, dealings, moneys, debts, effects, rights, credits, lands, tenements, property and estate of the defendant, and his *secret grants, or fraudulent transfer or conveyance of the same.* And they may issue their warrant to the sheriff, or any constable of the county, commanding them to break open any house, chamber, room, shop door, trunk, chest, or other place or thing, where they shall have reason to believe any property is deposited or secreted. And finally, it is enacted, that this act shall be construed in all courts of judicature in the most liberal manner for the detection of fraud, the advancement of justice and the benefit of creditors.

Where the legislature has done every thing in its power towards enabling the attaching creditor to reach the debtor's property, in whosesoever hands it may be, and has enjoined it upon all the courts of the state to give the most liberal construction to the act, for the purpose of ferreting out fraud—to advance justice and benefit the creditors; is it a sufficient reason, when this court is appealed to to exercise its powers, in preventing the whole of the debtor's estate, real and personal, from being swept beyond the reach of the attachment by a fraudulent conveyance or judgment, to refuse its aid, and declare itself powerless, upon the ground that the plaintiff in attachment has no specific lien upon the property? By virtue of his attachment, the creditor attaches all the rights and credits by the express provisions of the act. What better lien does a judgment and execution creditor obtain? In fact, he gets none at all, for he cannot, by virtue of his execution levy upon or sell them.

In the case of Melville *v.* Brown, 1 Harr. R. 364, James Hoy, who had taken out an attachment against Brown, moved the Supreme Court for a feigned issue to try the *bona fides* of a judgment confessed to Melville. The Supreme Court denied the motion upon the ground, that if the applicant had gone into a Court of Chancery, the court would not have entertained his bill, because he was no more than a creditor at large. The learned Chief Justice cites the leading American and English cases for the general principle, that a creditor at large cannot interfere with the disposition of his debtor's property. Two reasons are given, why a court of equity would not interfere on behalf of an attaching creditor. First, the reason given by Chancellor Kent, in Wiggins *et al. v.* Armstrong *et al.*, (2 J. C. R. 144,) that to permit such an interference might lead to an unnecessary, fruitless and oppressive interruption of the rights of the parties. And this remark is made in view of the fact, that upon investigation, it may turn out that there is no debt due from the defendant to the plaintiff, and if so, the litigation would have been altogether fruitless, whether the judgment questioned was fraudulent or not.

But while such a reason may be good as respects a mere creditor at large, may it not be answered, that in reference to an attaching creditor, the act itself justifies, and almost commands, this interference? Does not the act put him, by virtue of his attachment, upon a very different footing from that of a mere creditor at large? And reviewing the object and policy of the act throughout, is it not obligatory upon courts of law and equity to construe the provisions of the act liberally, although it may occasion some delay, inconvenience and expense to parties? The same inconvenience and oppression here suggested, necessarily follow upon the execution of some of the provisions of the act. The auditors may bring suits for sums under one hundred dollars. Suppose they should sue and recover the money, and after all it should turn out that the defendant in attachment did not owe the plaintiff, or any body else, any thing; or suppose, after putting these alleged creditors of the defendant in attachment

to the inconvenience and expense of a suit, it should turn out they were not creditors, how much expense, inconvenience and oppression, would be incurred and suffered to no purpose? The sheriff, under the direction of the auditors, may break open houses, trunks, and chests; or may demand of individuals having property in their possession supposed to be the defendant's, to deliver it up to his custody, or to give bonds for its forthcoming when required; or he may, under certain circumstances, summon a jury to try the right to the property. If it should turn out in the end, that the defendant in attachment owes nothing, there would be very great hardships, and in many instances very oppressive, and yet they must be endured, because the legislature have thought proper to impose them as burthens, in order to promote the administration of justice. Surely, in view of all these proceedings, recognized and prescribed by the act, it cannot be said that the creditor, or creditors, who are pursuing their rights under and by virtue of a writ of attachment, armed at every point with instruments and power to reach the debtor's property, or supposed property, whether secured by bars and bolts, or covered up in the hands of others under fictitious claims, have no more right in a court of chancery to question the disposition of such property, than one whom the law has as yet provided with no process to follow and impound it.

But is not this idea of oppression very much imaginary? As far as the debtor is concerned, all his rights over the property are already interfered with and interrupted. The attachment has taken from him the custody and control of the property. But it may be in the hands of another who claims it under a judgment confessed, or under a mortgage given to him by the defendant in attachment. The attaching creditor, whom the law has permitted to take out a writ to impound the property until a court of law can ascertain judicially whether or not he is a creditor, files his bill, charging the judgment or mortgage to be fraudulent. If by his answer the court sees he has a clear conscience, his disposition of the property will not be interfered with. But if, out of his own mouth he is convicted of fraud, what oppression is it for this

court to control his actions over the property, until the court at law where the legal proceedings have been instituted, shall have judicially determined whether there are any, and if so, who are the creditors entitled to investigate the fraud?

By the provision of the act already referred to, where the plaintiff in attachment sues the garnishee, and holds him to bail, the court continues the suit until the action against the defendant in attachment shall be adjudicated upon and determined.

But it is said again, that the plaintiff has no lien upon the defendant's goods; and the case in 1 Harr. is referred to as authority. The court do there say, that the plaintiff has no lien upon the goods—that they are not in his custody, or subject to his control—that he never had possession of them, and could not therefore acquire a lien upon them, such as an attorney has upon deeds and papers for his costs; a factor, upon goods consigned to him, for his claims as factor; a common carrier, upon the goods he has carried, for his wages; or an innkeeper, upon the horse of his guest, for the amount of his bill. This is true; nor has a judgment and execution creditor any such lien, nor any possession or control of the property levied upon. The court says, "goods when properly attached are strictly in the custody of the law." And so they are when levied upon by virtue of an execution. The plaintiff has no more control over them in the one case than in the other. And this court will interfere if any such control is attempted to be exercised. (Edgar *v.* Clevenger *et al.*, 1 Green Ch. Rep. 263.) The court, in 1 Harr., say: Liens are of two kinds:—1st. Such as a party acquires by his own act; or, 2d. Such as the law creates; as in case of judgment and execution. But why not add "attachment" also, for by the very terms of the act the attachment, *binds* the property and estate of the defendant attached from the time of executing the same. What is this, but creating a lien upon the property, for such debts, if any, as may be found due by the judgment of the court, to the plaintiff in attachment, and other applying creditors.

By the act respecting executions, Statutes of New Jersey,

R. S. 977, Sec. 3, the same word *bind* is used as in the attachment act.

I do not feel myself at liberty to draw a distinction between the nature of a lien by virtue of an execution, and that of a lien by virtue of an attachment; nor should I consider I was giving to the act a liberal construction for the detection of fraud, if upon so nice a question I should refuse to a complainant the aid of this court, in investigating the *bona fides* of an alleged fraudulent judgment or conveyance.

Upon the argument, the case of Quackenbush *v.* Van Blarcom *et al.*, was referred to, which was a case upon this point, in every respect like the one before the court. It is not reported. The Chancellor's opinion was mislaid and not published, but I have examined the papers on record. Chancellor Pennington sustained the bill. I have seen the brief of counsel who argued that case. This point was discussed, and the case of Mellville *et al. v.* Brown was relied upon. I am likewise informed, that Chancellor Halsted sustained a like bill. Had the opinions of the Chancellors been published, I should have felt satisfied to have acquiesced in their views, without giving my own at length.

But this bill is informal and deficient in several particulars and cannot be sustained.

The bill ought to have been framed for the benefit of the complainant, and such others of the creditors of the defendant, as should come in and seek relief by, and contribute to the expenses of the suit. The bill does not allege for what amount the attachment was issued—nor that it was ever executed—nor what property was attached—whether real or personal—nor whether any property at all was attached. It would seem rather from the bill that the goods and chattels which were subject to execution were not attached for that reason. There certainly is no allegation in the bill, that the property claimed by these judgment creditors was attached. As to the books of account, which the bill alleges were fraudulently conveyed to some of the defendants, it is stated that the sheriff, on levying the said writ of attachment upon the books, it was ascertained the defendant, the day before

he absconded, had assigned them to some of the defendants, but whether the sheriff found the books and attached them, is not stated.

The defendant in attachment is not made a party to the suit. There can be no decree without him. The bill is therefore also defective for the want of the necessary parties.

For the reasons stated, let the injunction be dissolved with costs.

AARON KING, Administrator of BENJAMIN KING, dec'd., v. MARIA KING *et al.*

In a suit by the administrator of a deceased obligee to foreclose a bond and mortgage, and the defence of payment set up, a brother of the deceased, entitled to a distributive share of his personal estate, is not a competent witness for the complainant.

To render him competent, he should release all his interest in the bond and mortgage, and the administrator should release him, or his interest in the estate, from all liability, on account of the costs of the suit.

Nor would he be competent to prove the execution of such releases where they are attested by a subscribing witness; a release of this kind must be regularly proved, the same as any other deed.

In such a suit, against the widow and heirs of the deceased obligor, they can claim as a payment of the bond an account of the obligor against the obligee for board furnished him under an agreement that it should be applied in reduction of the bond, and such agreement need not be expressly proved, but may be inferred from circumstances.

Such agreement need not be proved as set out in the answer; the substance only of the issue need be proved, nor is the same degree of accuracy required in an answer, as in a bill.

An allegation of payment in chancery pleadings, is sustained by proof of satisfaction in any way, as by set off, award and satisfaction, &c.

The statute of limitations is no bar to such a defence, although more than six years had elapsed after most of the account had accrued; nor the statute against frauds and perjuries, on the ground that the agreement was not to be performed in one year from the making thereof.

This cause was heard before the Chancellor at February term, 1852, upon the bill, answer, replication and proofs. The nature of the pleadings, and the facts, sufficiently appear in the Chancellor's opinion.

Messrs. *J. B. Dayton* and *Browning* for complainant.

Mr. *T. W. Mulford* for defendant.

THE CHANCELLOR. This bill is filed by the complainant as the administrator of the estate of Benjamin King, deceased,

for the foreclosure of a mortgage made and executed to Benjamin King by Samuel King, his brother. The mortgage was made to secure the payment of twelve hundred dollars and interest, payable in one year from the sixth day of April, 1839, the date of the mortgage and accompanying bond.

Samuel King, the mortgagor, is likewise deceased, and the defendants in this suit are Maria King, his widow, Robert King, Adeline King, Benjamin F. King and Rebecca King, infants—the children and heirs at law of the said Samuel. The payment of three hundred dollars of the principal and of the interest up to April 6th, 1840, is admitted.

All the defendants have answered by one joint and several answer. They insist that there is nothing due on the bond and mortgage, and that the debt was paid and satisfied in this wise. That Benjamin King boarded with his brother Samuel, and was furnished with boarding, washing and lodging, from the fifth day of September, 1839, to the first day of January, 1847, at the price of three dollars a week, under an agreement between them, that the said board, lodging and washing, should be furnished and received on account, and in payment of the debt due on the bond and mortgage, and that Benjamin King would permit and allow the same as a set-off in payment and discharge of the said debt.

Witnesses have been examined on both sides, and the cause is submitted upon the pleadings and proofs.

The most material witness examined on behalf of the complainant is Peter King. He was objected to as an incompetent witness when called before the Master, and the objection was insisted on in the argument of the cause. Is he a competent witness?

The witness is a brother of the complainant, and of Benjamin King, the intestate, upon whose estate the complainant has administered. He is entitled, as one of the next of kin, to one-third of the distributive personal estate of his deceased brother. The estate is solvent, and the witness' interest in it, independent of this bond and mortgage, will be about one thousand dollars. The witness therefore is directly interested in the result of this suit. He will gain

or lose one-third of the money recovered or lost by it. The witness was objected to before the Master. Two releases were then produced, one executed by the witness to Aaron King, the complainant, not as administrator, but in his own right releasing to him, all the right and interest of the witness in the bond and mortgage in this suit. The other release, was from Aaron King, the complainant, in his individual capacity, to his brother, the witness. To render this witness competent, it was necessary that the complainant, as administrator, should have released him, or his interest in the estate, from all liability for, and on account of, any part of the costs of this suit; for if the suit is lost, the distributive share of Peter King will be chargeable with a proportion of the costs and expenses. The release of Aaron King, in his individual right, of this liability, amounts to nothing. Peter King can never set it up in bar to any claim the administrator may make for his proportion of the expenses.

But further, the releases were proved by the witness himself, and were then offered in evidence to render him competent. The defendants' counsel objected to them, and the objection was well taken. The releases are witnessed by James B. Dayton, and he should have been called called to prove their execution.

The witness was not sworn on his *voir dire* at the request of the defendants, but was sworn on behalf of the complainant. It was not competent to prove the execution of the releases by him. The subscribing witness was then before the Master, and no reason is given why he was not called upon. The release must be regularly proved, as any other deed. 1 Barb. Ch. Prac. 267; Botham *v.* Stringler, 1 Esp. Rep. 165; Butchers' Co. *v.* Jones, Ib. 161; Corking *v.* Gerard, 1 Camp. 37.

These are not mere technical objections, but are substantial and reasonable, and the court has no right to disregard them when they are insisted on by the party who makes them.

The account which the witness gives of these releases is very unsatisfactory. No consideration whatever passed be-

tween his brother and himself. He has received from his brother quite, if not all, the amount coming to him from the estate, for which his brother holds his notes and receipts. He says, his brother told him if he would execute the release, he would take it for the money he owed him. And yet he at the same time says, that his brother still holds these notes against him, and he expects to pay his brother the money as fast as he gets it.

In deciding this case, I must lay entirely out of view the evidence given by Peter King.

Let us now examine the defence as to its legality, and how far it is established by the evidence.

The complainant insists, that there can be no set-off in this suit of any debt due for board, or otherwise, from Benjamin King to Samuel King. It is undoubtedly correct, that there can be nothing like a legal set-off. These defendants can bring no suit against Benjamin's administrator for any debt Benjamin might have owed his brother. No set-off can be allowed, unless the debt or claim is such that the party may maintain a counter action for it. To permit the heirs at law, in a suit against them by the administrator of an estate, to set off a debt due their ancestor from the intestate, would be to change the course of distribution. Whatever debt may be due from Benjamin King's estate to that of Samuel's, it can be claimed only by the personal representative of Samuel King. He only can bring suit for it, and consequently he only can claim the benefit of it as an off-set.

But these defendants do not claim any allowance by way of legal set-off. They do not set up a claim of Samuel against Benjamin King of an independent, legal debt due from the latter to the former. They claim in equity, a credit on this debt, the payment of which the complainant is enforcing, for services which were rendered to the complainants intestate, not independent of, but in refereuce to this very debt, and under an agreement, either expressed or implied in law, that they should be applied to its reduction.

A defence like this would be good at law, independent of the statute respecting mutual dealers, and could be set up by

the obligor himself, or by his representative, against the obligee, or whoever might hold the bond as assignee or otherwise. It is an equity existing between the parties, which will be recognized and enforced in a court of law, and will follow the obligation into whosesoever hands it may pass, either by the operation of law or the will of the parties. It is not a set-off, but a legal and equitable defence against the claim sought to be enforced for so much as the services rendered amount to. (See the cases cited in 3 Harr. 227; Cumberland Bank *v.* Hann.)

If payments of money were made by Samuel King to Benjamin King, or services rendered, or board and lodging furnished, under an agreement that they should be applied to the satisfaction of this bond and mortgage, or under circumstances from which the court may infer such an understanding, it is a good defence in equity for the obligor, or for any one else against whom it may be sought to enforce the payment of the debt.

It would be a great hardship, if such a defence in a case like this was not available.

These services were rendered, it is alleged, from the year 1839 to the year 1847, upon the understanding they were to be credited in reducing the debt on the bond. If no allowance can be had for them here, a suit at law must be brought, and the statute of limitations will be a good defence to three-fourths of the claim. The obligor and those claiming under him, have quietly reposed under the supposition that the bond debt was reduced by the services rendered, and now, when they claim the credit, they are told it is an independent, disconnected debt, and redress must be sought, where it cannot be obtained, in a suit at law. Independently of the statutes of set-off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases, where although there are mutual and independent debts, yet there is a mutual credit between the parties, founded at the time, upon the existence of some debt due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand, a knowledge on

both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt, as a means of discharging it. S. E. J. 1435.

There is no difficulty arising from the nature of this suit. It is for a decree of sale of the mortgaged premises to pay so much of the debt as may, upon account, be ascertained to be due, and in taking that account, all proper allowances should be made.

I think there is no difficulty, as far as the law of the case is concerned, that the defence set up is available in this suit. The only remaining question is—does the evidence support it?

It is not necessary that any express agreement should be proved; it may be inferred from circumstances. This was admitted in the case of Green *v.* Storm, 3 Sandf. Ch. Rep. 308. The suit was brought for sale of mortgaged premises. The defence was payment. The defence failed, because it turned out to be a mere legal set-off for money which had been advanced while the mortgage was in other hands, and for different purposes.

In Jeff *v.* Wood and others, 2 P. Wms., 128, the Master of the Rolls says:—"It is true, stoppage is no payment at law, nor is it, of itself, a payment in equity, but then a very slender agreement for discounting or allowing the one debt out of the other, will make it a payment, because this prevents circuity of action and multiplicity of suits, which is not favored in law, much less in equity." And again: "It seems that the least evidence of an agreement for stoppage will do; and in these cases equity will take hold of a very slight thing to do both parties right." And it is still more reasonable, that where the matter of the mutual demand is concerning the same thing, then the court should interpose and make the balance only payable.

Let us now look at the evidence we have of an agreement between the obligor and obligee, that the board, lodging, &c., furnished the obligee should be taken, and considered in payment, as far as it went, of the debt secured by the bond and mortgage.

The bond and mortgage bear date the sixth day of April,

1839. The debt was twelve hundred dollars, payable, with interest, in one year from that date. The obligor and obligee were brothers. There is no evidence whether the consideration of the bond was for money lent, or how the debt was contracted. Samuel was a man of family and Benjamin a single man. They went into partnership in keeping a public house and garden, at Camden, in 1838, and dissolved on the 20th of March, 1839—so that the bond and mortgage bear date eleven days after the dissolution, but whether the debt, or any part of it, grew out of the partnership transactions does not appear. The evidence is clear, that from the latter date up to January, 1847, with the exception of six months, while he was at Mr. Cake's, and only lodged at his brother's house, Benjamin boarded, lodged, and had his washing done at his brother Samuel's. There is pretty strong evidence by two witnesses, that the price agreed upon for board was three dollars a week; and as to the evidence of the real value, no witness puts it lower than two dollars and twenty-five cents a week. Thus, upon the lowest estimate of the value of the board, &c., and, I think, upon very clear testimony, there was an indebtedness from Benjamin to Samuel of very nearly nine hundred dollars. How was it paid from time to time? Samuel, soon after the bond was given, turned out an utterly worthless man, doing nothing for the maintenance of his family. His wife, by her industry as a market woman, provided for the support of her husband and her children and the boarding of Benjamin. Did Benjamin do any thing towards the support of the family, by advancing money, or in any other way? Witnesses were sworn, who were on terms of intimacy with the family, visiting them frequently, and sympathising with Mrs. King in her struggles, and it could hardly be, that any considerable aid was furnished by Benjamin in any way, without these witnesses having some knowledge of it. All the proof of any assistance furnished by him during the whole period he was in the family, was providing a meat machine for Mrs. King to use in her market business, and this he himself afterwards sold. If during this long period of time, Benjamin was in

the habit of doing any thing for the maintenance of the family, there must be some witnesses who can establish the fact.

There are two endorsements on the bond, both without date. They are as follows: "Received three hundred dollars of the princ*iple*. $300." "The interest paid up to April 6, 1840." The fair presumption is, that the sum of three hundred dollars principal was paid prior to April 6, 1840. Had that amount been paid at any subsequent period, a part of it would have been credited for interest due. It is fair to presume that the credit was given at a time when there was not any thing due for interest on the bond. The testimony of John W. Potts corresponds with this presumption. He says, in a conversation with Benjamin about this payment, he understood from him that it was made some year or eighteen months after the date of the bond. The endorsements bear very much the appearance of having been written at one and the same time. If this be so, no part of the credit is for board. There is no credit whatever upon the bond from April 6, 1840; and it can scarcely be supposed that from this period up to January, 1847, Benjamin paid up from time to time his indebtedness for board, while he had in his hands this obligation, on which nine hundred dollars were due, drawing interest. During this period there is no evidence of any dealings or accounts between the parties, except of the bond and mortgage on one side, and the board bill on the other.

In addition to these circumstances, we have the testimony of two witnesses to the declarations of Benjamin King, as to what the understanding of himself and his brother was in reference to the matter. He told John W. Potts, that he got nothing from his brother except what he boarded out, and that he was boarding with him on account of the claim he held against his property; that his board and lodging were in payment of his claim against Samuel so far as it went. He told him in several conversations, he would not have boarded there, had it not been for this claim; and he says, he heard him tell others the same thing. I have

not overlooked the circumstances, adverted to on the argument, as questioning the accuracy of this witness. But I can see nothing in his conversations with Mr. Mulford, or with the administrator, which the witness himself details with great frankness, going to weaken the force of this part of his testimony. These conversations only show, that until Mr. Mulford was advised with, the witness did not know that these credits could be made available, if the administrator refused to allow them. He said nothing inconsistent or irreconcilable with the evidence he gave before the Master.

Jeremiah Carter, another witness, says, that at one time, in a conversation with him, Benjamin was complaining of the treatment of the children towards him, "I asked him why he boarded there then, or said to him, I would not board there then, or something to that effect; he said he would not, but that he held a bond and mortgage against Samuel for, I think he said, twelve hundred dollars, or something like that amount. He said he boarded there on that account, and signified that he did not expect to get any thing except what he boarded out."

Now, upon this evidence, and under these circumstances, is it not equitable and right, that whatever may be due for board and lodging should be credited on this bond and mortgage? Is it not reasonably clear, that it was the understanding of the parties, that the board and lodging were furnished on account of this debt? And if they were, why ought not the credit to be allowed on it?

I have examined, with great care, all the objections that were very ably urged on the argument, in opposition to the view I have taken of the case.

As to the agreement, as set up in the answer, it was objected, it was not proved, in the terms, as alleged and set out in the answer. In addition to what I have said, as to the agreement being expressed or implied, I would observe, that the same strictness of proof is not required, in a case like this, as in a case for specific performance where the very terms of the agreement or contract are necessary to be

ascertained, in order to obtain a decree. It is a general rule that the substance only of the issue need be proved; nor is it necessary that the same degree of accuracy should be observed in an answer, as is required in a bill. 1 Barb. Ch. P. 138; 2 Dan. 244; Gresley's Eq. Ev. 167.

An allegation of payment in chancery pleading is sufficiently sustained by a proof of satisfaction of the demand in any way, as by set off, accord and satisfaction, &c. Lee *v.* Beatty, 8 Dana, 212.

It is true, there must be a correspondence between the *allegata* and *probata*. I think there is, substantially, a correspondence in this case.

As to the statute of limitations, I do not think it can be interposed to any part of this defence. If a payment of money had been made ten years ago on this debt, and not credited on the bond, the obligor, or those defending under him, would not be debarred by the statute, from the benefit of the payment. Besides, there was an open, mutual, running account between these parties, as to these specific demands.

Nor can I see how the statute of frauds and perjuries can be made applicable, on the ground that this was an agreement not to be performed in one year from the making thereof. The services have been rendered and accepted, and compensation is claimed, and the simple question now is, whether compensation is to be applied to this particular debt under the agreement of the parties; and not whether the execution of an agreement is to be enforced which was not to be performed within a year. The matter in controversy is not in reference to an executory, but an executed agreement.

I have not overlooked the fact that a fair inference may be drawn from the whole evidence, that there is a considerable sum still due on this bond and mortgage. That may all be true, and yet I do not see that it militates against the conclusion, that there was a large amount due from Benjamin to Samuel for board and lodging, and which, by the understanding of the parties, ought to be credited on this

debt. The matter was allowed to run on during Samuel's life without any settlement, and although Benjamin lived nearly two years after Samuel's death, it does not appear he took any steps to collect the bond or to adjust what was due upon it. I think, we may judge from Benjamin's conduct, for he never appears to have treated his brother or family harshly as to this claim, that had a settlement been made in his life time, this whole matter would have been adjusted without difficulty.

A reference must be had to a Master to take the accounts.

First—Of what is due for principal and interest on the bond and mortgage, allowing the credits endorsed.

Second—An account of what is due for board, lodging, and services rendered to Benjamin, during such of the period as the board, &c., were furnished him—from the fifth day of September, 1839, to the first day of January, 1847—and in taking this latter account, let the master make all just and proper allowances for payment in money, or services rendered, or provisions furnished the family by Benjamin. The amount to be allowed for board, &c., will be such sum per week, or month, as they shall be proved to the satisfaction of the master to have been reasonably worth, unless some specific sum shall be proved to have been agreed upon.

JOHN DE GROOT v. E. R. V. WRIGHT and WIFE.

Where a conveyance of land has been made in fee, and a third person claiming a life estate in the same land, by virtue of an alleged parol agreement made with the grantor before the execution of the deed, seeks to reform the deed so as to protect his life estate, he must make the grantor, as well as the grantee, a party to the suit.

Such agreement cannot affect the grantee unless he had notice of it.

The bill alleges, that about the year 1817, Joanna De Groot, the mother of the complainant being seized in fee simple of certain lands and premises of about eighty acres, in the county of Bergen, in consideration of natural love and affection, and of the benefits of the improvements proposed, agreed with complainant that he might take possession of the land, and make improvements thereon, and for so doing he might enjoy the same, and take the rents and profits during his natural life. That at this time the land was in a low state of cultivation, and no buildings thereon—that complainant entered in pursuance of said agreement, improved the same, built thereon a good farm house, barn and other buildings, and planted fruit trees, all at his own expense, amounting to at least $3,000. That the complainant, by himself and tenant, is still in possession of the land.

That in September, 1846, Joanna De Groot conveyed the said land and premises to Naomi C. Wright, the wife of E. R. V. Wright, and daughter of said complainant; that the only consideration therefor was natural love and affection, and that it was made and accepted with full knowledge by the said Naomi and her husband, of the rights and interest of the complainant in the premises, and at the time it was agreed between them, that the deed was not to take effect during the life time of complainant, so as to interfere with his rights and interest, and that the complainant was to have

the use and occupation of the premises during his life. That at the time she executed the deed, she was upwards of eighty years old—confided in said E. R. V. Wright, who is a lawyer, to draw the deed, and if the said deed does not reserve the use of the said land during complainant's life, it is in violation of the agreement made by the said Naomi and E. R. V. W. with the said Joanna, and is a fraud upon the said Joanna and the complainant.

That the said E. R. V. W. and wife have commenced actions of ejectment in the Bergen Circuit against complainant and his tenant, to recover the possession of the said lands.

The prayer of the bill is, that the deed from Joanna to Naomi may be corrected in conformity to the agreement of the parties so as to reserve to the complainant a life estate in the premises, and for injunction to stay the suits at law, and restrain them from commencing any like action during complainants life time.

The defendants, by their answer, admit that the complainant and his mother lived together on the same farm as stated, but fully deny all knowledge of any agreement between them, as alleged in the bill, entitling complainant to enjoy the land for his life, or for any other time, except as tenant at will, and they believe no such agreement was ever made as is alleged in the bill. They admit the improvements made upon the land, but state that the said Joanna was a widow possessed of considerable property, consisting of money at interest, a house and lot in New York, and the land in question; that the complainant, being her only son, had her confidence—collected her monies—and that the monies so collected, unaccounted for, amounted to more than the value of the improvements—admit that complainant was in possession of the premises, and lived on part of the same with his mother, but say he was only tenant at will. They further say, that prior to March, 1844, Joanna D. had lost confidence in her said son, and determined to convey her property to her grand children, (the children of complainant,) upon the consideration of their securing to her support and maintenance during life. That in pursuance of

of that determination she did convey to Naomi the house and lot in New York, and to another grand-son, Samuel De Groot, a part of her real estate in New Jersey, and thereupon the said E. R. V. W. and S. De G. executed to the said Joanna a deed of covenant to support and maintain her during life; that afterwards the said Joanna discovered that her son, the complainant, without her knowledge, had incumbered the house and lot in New York, and on that account she executed the deed to Naomi mentioned in the bill. They deny fully that at this time they, or either of them, had any knowledge, intimation, or belief, that the complainant had any interest for his life, or for any other term, in the said land, and they deny any such agreement respecting it as is alleged. They deny that the deed was drawn in any way different from any agreement between them and the said Joanna, or different from her understanding, wishes, or instructions, but according to her wishes and instructions.

Upon filing the bill, an injunction was granted to stay the proceedings of the ejectment suit, which was dissolved upon the coming in of the answer.

Proofs were taken in support of the bill, and contra; and the cause came on for final hearing at February term, 1852.

Mr. *W. Pennington* for complainant.

Messrs. *Zabriskie* and *P. D. Vroom* for defendants.

THE CHANCELLOR. The defendants, by their answer, having denied every material fact upon which the complainant's equity rests, we must look to the proofs alone for the support of the case made by the bill.

The specific relief prayed for by the bill, is that the deed from Joanna De Groot to Naomi Wright may be reformed and corrected in conformity to the agreement of the parties, so as to reserve to the complainant a life estate in the pre-

mises, and the defendants be enjoined from further prosecuting their actions of ejectment, and from commencing any other action to disturb the complainant's possession during his life.

There can be no decree for a reformation of the deed with the parties now before the court. That is a question in which Joanna De Groot is immediately interested, and for that relief a decree against her would be required.

But there is nothing in the proofs taken that would justify a further investigation upon this part of the case.

The allegations of the bill are, that the deed was made and accepted with full knowledge by the defendants of the rights and interest of the complainant in the premises; that it was understood and agreed between the parties at the time, that a reservation of those rights should be contained in the deed; and if they are not so reserved, it is a fraud upon the said Joanna and the complainant.

Joanna De Groot, whom the complainant examined as a witness, testifies, that the deed was made as she intended it should be. And it further appears from her testimony, and that of the other witnesses who were cognizant of the whole transaction, that one of the objects in making the deed was, to place the property in a situation so as to prevent the creditors of the complainant, upon the death of his mother, from reaching any interest he might have in it. The proof of any fraud upon the part of Mr. Wright, in respect to drawing the deed, wholly fails, and the evidence, all of which is taken on the side of the complainant, places the matter beyond a doubt, that the deed was drawn in conformity to the wishes of the old lady, and the understanding of all the parties.

But the complainant insists that upon the case made, he is entitled to the injunction prayed for in his bill, by way, or in lieu of, a specific performance of the alleged agreement made between his mother and himself. The agreement is alleged to have been, that he should enjoy the possession of, and the rents and profits of the premises during his life, in consideration of the improvements he should put

upon them. It is alleged that improvements were put by him upon the premises under that agreement—that the defendants knew of that agreement, and promised, at the time the deed was executed, that it should be carried out. That this court ought, under the circumstances of the case, by way of injunction as prayed for, to secure to the complainant the benefit of his agreement with Joanna De Groot.

Admitting the agreement between the complainant and Joanna to have been made, as the bill alleges, and that this court could have decreed a specific performance as between them, it by no means follows, that the complainant is entitled to any relief as against these defendants, which will at all impair the rights which were acquired under the deed to Naomi Wright. The charges in the bill affecting the rights of the defendants, to wit: that they knew of this alleged agreement—that they promised to carry it out, and that through fraud it was not incorporated in the agreement, are all of them, not only denied by the answer, but are disproved by the evidence introduced by the complainant himself. Without such proof, the complainant has no equity as against these defendants. The deed to them is in no way impeached, or called in question, except in the particulars referred to. It is true there is some evidence of an understanding that the complainant's possession should not be interfered with during his life, and that one or both of the defendants did promise to this effect. But the evidence does not show that the deed was executed, in part, upon the consideration of such promise, or that when such promise was made, the defendants, or either of them, had ever heard of any agreement between the complainant and his mother, or that they know, or had reason to believe, that the complainant had any equity, by reason of any improvements he had put upon the premises. They are therefore *bona fide* purchases without notice. In justice to the defendants, the daughter and son-in-law of the complainant, it should here be mentioned, that before the suits at law were commenced, they expressed a willingness that the complainant should retain the possession of the premises, upon

acknowledging their title. They offered to lease him the premises at the nominal rent of one dollar a year. He not only rejected the offer, but denied they had any right in the premises.

Was there ever any agreement between the complainant and Joanna De Groot, the performance of which this court could enforce?

Joanna De Groot says, "There was no understanding I know of about that place when he commenced these improvements—no further than that it was all his as far as he *knowed*—there was nothing said about it that I remember."

And again, on cross examination, "When my son went on to make the improvements spoken of, there was no agreement between us that he should have it for life—why should there be? He was my only child, and I and he expected that he would have every thing that I owned when I died. If he had had good luck in the world, there never would have been any trouble with it."

This is the only witness called by the complainant to prove the agreement. It is manifest then that there was no *express* agreement.

On behalf of the complainant, it is insisted that there was an implied agreement arising from the circumstance of his improving the property, and the value of those improvements.

Without stopping to inquire whether the Court will *infer* an agreement from such circumstances, for which they will decree a specific performance, let us see how the complainant sustains this part of his case by evidence.

The improvements which have been put upon the premises are valuable, but how much money has been expended does not appear.

What does Joanna De Groot say with respect to them?

She says, "All these improvements were made at the expense of John De Groot; I had nothing to do with it at all."

She further says, that he has been in the possession of the premises since 1817, and has taken to himself the profits.

That while making the improvements he had charge of all her affairs, "money and every thing else. He collected my interest and New York rents and expended the money as he thought right—who else should do it?" She refused to tell whether he had expended the principal of her money she had at interest. She was an old lady, and at the time of her examination eighty-six years of age.

It appears, that during all the time the complainant occupied the premises, his mother lived with him; that while he was making these improvements, he had the management of all her affairs, and the use of all her money, which amounted to a considerable sum—very much larger than the value of all the improvements put upon the premises. The house in New York brought a rent of $400 a year, which he collected and used. He raised upon that house on mortgage $2,500, unknown to her, and for which he did not account to her, and at one time she paid for him a debt of a thousand dollars; that he became embarrassed in his circumstances, and when the sheriff was inquiring for property out of which to raise money to satisfy claims against the complainant, he said he had no interest in the property, and was only tenant at will.

From these circumstances it is, that this court is now asked to infer an agreement, that he was to have a life interest in this property, and to make a decree by which it may be secured to him.

Upon a case like this, I do not feel myself called upon to decide any of the vexed questions of law discussed upon the argument, for whatever might be my conclusions, I could make no application of them to this case, from which the complainant could derive any advantage.

The bill must be dismissed with costs.

GEORGE H. RENTON v. CHARLES L. CHAPLAIN and AMOS K. CARTER.

Where under a judgment and execution against one partner his interest in the partnership effects is sold, and the purchaser files a bill against the partners, praying for an injunction, and the appointment of a receiver, the complainant, on the hearing of the application for injunction, may read an affidavit in support of that part of the bill which presents the case as somewhat analogous to one of waste, where the general rule on this subject does not apply.

A sale of partnership effects, under a separate execution against one partner, operates as a dissolution of the copartnership.

If the sale be fraudulent, by collusion between the purchaser and insolvent partner, for the purpose of depriving the other partner of rights secured to him by the copartnership articles, a court will not aid the purchaser in obtaining his object.

If the sale be *bona fide*, the court will not, as a matter of course, grant an injunction and appoint a receiver; the purchaser stands in no better condition in reference to the partnership matters than the defendant in execution stood, and the court will not interfere with the other partner in winding up the partnership, unless his gross misconduct calls for such interference.

This was an injunction bill, and after notice to the defendants of the intended application, and an answer put in by one of them, the motion for injunction was agued before the Chancellor, whose opinion discloses enough of the allegations of the bill and answer for a full understanding of the case.

A. C. M. Pennington for the motion.

A. Whitehead contra.

THE CHANCELLOR. Upon filing this bill, an application was made for an injunction and the appointment of a receiver. Notice was directed to be given to the defendants, that an opportunity might be afforded them to be heard, if they desired it. Charles L. Chaplain filed an answer, and Car-

ter, the other defendant, did not appear. At the hearing, the complainant was permitted to read an affidavit in support of some of the allegations of the bill, upon the ground that the affidavit referred to those features of the bill, which present the case as somewhat analogous to one of waste, and where the general rule as to reading affidavits upon a motion like this does not apply. 1 Green's Ch. Rep. 182; Peacock *v.* Peacock, 16 Ves. 49.

The defendants were partners, carrying on the business of manufacturing and vending spokes, handles and other articles, under and by means of a certain patented machine, known as Blanchard's patent for turning and cutting irregular forms. Their place of business was the city of Newark, where they had considerable real and personal property—machine shops, and the necessary buildings and machinery for their business operations.

Several judgments at law were recovered against Amos K. Carter, one of the partners, amounting to about $3,500. Upon these judgments executions were issued, and under them, the sheriff of the county of Essex, on the 23d of February last, sold "all the right, title and interest of the said Amos K. Carter in the machinery, stock, tools, materials and fixtures at the Phœnix Works in the city of Newark," and "all the right, title and interest of the said Amos K. Carter of, in, and to, all and singular, the stock, property, and effects of the partnership doing business under the name of Charles L. Chaplain, composed of the said Charles L. Chaplain and the said Amos K. Carter." Of this property and interest in the partnership the complainant became the purchaser, as he alleges, at the sheriff's sale. By this bill, he prays: that the said partnership may be declared and decreed to be dissolved and void—that accounts may be taken of all, and every, the said copartnership transactions, and that the real and personal estate, and all other the property and effects of the said partnership, may be sold and turned into money—and that a receiver may be appointed.

It is insisted, on behalf of the complainant, that the sale by the sheriff was, *ipso facto*, a dissolution of the copart-

nership, and that upon his exhibiting his bill in this court for an account, an injunction and appointment of receiver follow as matters of course.

And again. It is argued, if this proposition, to the extent stated, is not true; yet the fraudulent conduct of the defendants, and the mismanagement and waste of the property by Charles L. Chaplain, who is now in possession of it, make a case for such interference of the court.

It is laid down by all the elementary writers on partnership, and seems now well established by judicial decisions, that "a sale of partnership effects, under a separate execution against one partner, operates as a dissolution of the copartnership.

It is true, that in many cases this rule must necessarily work great hardship; and particularly so, where a large capital has been expended in a manufacturing business—the partnership entered into for a definite period unexpired—and the anticipated profits depending upon the skill that could be acquired only by time and experience. And yet the dissolution seems to follow as an unavoidable consequence. The capital and the interest of the insolvent partner are withdrawn. There is no longer any inducement for him to devote his time or his abilities to the business of the partnership. A stranger has, by law, assumed a position which he never would have occupied with the consent of the other partners, and it would be unwise and unreasonable for the law to force him into the partnership, either against his own consent, or the consent of the other partners. Whether, by the deed of copartnership, provisions may not be made for a dissolution of this kind, which may in some measure lessen the inconvenience and disasters which in many cases necessarily follow, is a question of moment.

In the case of Wilson *v.* Greenwood, 1 Swanston's Rep. 471, by the deed of copartnership, it was provided, that on dissolution by death, notice, or misconduct of a partner, the remaining partner should have the option of taking his share, at a valuation payable by yearly instalments, in the course of seven years. Four years subsequent, the partners,

by another deed, declared (after a recital that such was their intention in the articles) that in the event of bankruptcy, or insolvency, the same arrangement should be adopted as on dissolution by death, notice, or misconduct. Within a few months after, one of the partners became bankrupt. The assignees of the bankrupt partner filed their bill for account, and the appointment of receiver. The copartnership deed was set up in opposition to the bill. Affidavits were read on both sides—on the part of the assignees, going to show that the latter agreement as to dissolution in case of insolvency, was made in contemplation of bankruptcy, and on the part of the solvent partners, denying this to be so. The Lord Chancellor determined, that the provision was made in contemplation of bankruptcy, and was void. He asks the question, "Whether, supposing the original deed had provided for the dissolution of the partnership by bankruptcy, as it has provided for the dissolution by other means, *that* provision would be good?" He adds, "I will not say that it would not, but I have heard nothing to convince me that it would." But the question was answered, with reference to the English statutes and laws respecting bankrupts. Reasonable provisions in articles of copartnership, in reference to the insolvency of one or more of the partners, and which would not be clearly against public policy, cannot be objectionable, and may be made greatly to the advantage of all parties concerned, both of debtors and creditors, as well as of the solvent partners.

In this case, the partnership was for a term of five years —no provision was made for dissolution, but its continuation during this period was provided for, in case of the death or physical disability of either of the parties.

If, then, the complainant is a *bona fide* purchaser of Carter's interest in the partnership, under a judgment and execution against him, I am bound, by authority, to declare, that by the sale the partnership was dissolved, with the qualification hereafter mentioned.

But the answer denies that the complainant is a *bona fide* purchaser, and it insists, and sets up a variety of circum-

stances to show that he is not—that the complainant has confederated with Carter and others to break up the partnership—that the sale by the sheriff was resorted to for that purpose—that the complainant is a mere agent for one Quimby, who, together with Carter, has unlawfully endeavored to deprive the defendant, Chaplain, of the use of the Blanchard patent, which was the chief inducement for his forming the copartnership. The friendly relationship existing between the complainant and Carter—the manner in which all this property was sold—the time and mode of advertising it—the place of sale, being at the defendant's dwelling house—the price for which complainant purchased, which was $30 only, which fact the bill does not state—making the sale without Chaplain's knowledge—with a variety of other circumstances, are detailed, to show the *mala fides* of this whole transaction.

The complainant's counsel insists, that admitting it to be true, that the complainant and Carter had acted fraudulently, here was a sale at law of Carter's interest—the judgment, execution and sale, all standing good—Carter's interest passed by the sale, and *ipso facto*, the partnership was dissolved.

But if all this proceeding was a mere contrivance of Carter to involve his copartner in difficulty, and to force a dissolution of the copartnership, and if the complainant has lent himself to Carter, and become a purchaser of Carter's interest, for such purposes, he does not stand in any better position than if he had come into this court, the assignee of Carter, under an assignment made for the fraudulent purpose of breaking up the partnership. I know it has been held "that the voluntary assignment by one partner, of all his interest in the concern, dissolved the partnership, though it was stipulated in the articles, that the partnership was to continue until two of the partners should demand a dissolution. (Marguand *v.* The New York Manufacturing Company, 17 John. Rep. 525.) But by other authorities it has been held otherwise, and I do not consider that point settled. In one case, where the partnership was for no limited

period, a bill was filed to prevent one partner from dissolving the partnership. (See note to case Cranshay v. Maule, 1 Swanstone's R. 511.) And in another case referred to in the same note, the court, before dissolving the partnership, ordered a reference to inquire whether the business could be carried on according to the true intent and meaning of the articles. But be this as it may; admitting the law, as Chancellor Kent in his Commentaries, vol. iii. 54, inclines to consider it—that there may be a dissolution, by the voluntary act of either partner, whether the partnership was for a definite period or not—can it be doubted, that where one partner makes an assignment fraudulently, and for the purpose of dissolving the partnership, and depriving his copartner of the benefit of certain advantages secured to him by the articles of copartnership, that a court of chancery will aid the assignee in securing the benefits of his assignment to the injury and oppression of another, whom he is attempting to circumvent and defraud?

But take the case before the court as an illustration. It appears by both the bill and the answer, that the great inducement, and indeed the only inducement, for Chaplain to enter into this partnership, was the enjoyment of the use of this patented machine, which had been secured by Carter. By the articles of copartnership, Carter covenants, that Chaplain, as his partner, shall have the right, power, and authority to use with him the license granted by Blanchard for this machine. He covenants also to secure to Chaplain other valuable rights and interest in this machine, and their enjoyment in case of his, Carter's, death. Now, had Carter undertaken to dissolve the partnership of his own mere will, and by an assignment to deprive Chaplain of the benefits, which Carter, by his covenants, engaged to secure him, and had the assignee filed his bill, to obtain the aid of this court in affecting his object, would the court have entertained such a bill? I think not. And if the allegations of the answer are true in reference to the actings and doings of Carter in the premises, and the complainant is the mere agent, by whom it is attempted to embarrass and

defraud Chaplain, and to deprive him of the enjoyment of this patent, then the complainant stands in no better plight in this court than such a fraudulent assignee would.

But, admitting the sale and purchase to have been in ordinary and fair dealing, it does not follow, as a matter of course, that the complainant is entitled to the injunction and the receiver prayed for.

It is true, the partnership by the sale is dissolved. But why should the court interfere with the other partner in settling up the concerns of the partnership? Why should its management be taken out of his hands, and transferred to an officer of this court? The object in view, is to secure to the purchaser the benefit of his purchase. But the rights of the solvent partner are entitled to some regard, and the interest of the creditors of the firm are to be protected. Who so competent to protect and secure these rights and interest, as the solvent partner, who has every thing at stake, and whose familiarity with all the engagements and transactions of the concern, gives him very greatly the advantage over any one else that could be substituted for the purpose. Does it follow, because one partner has become insolvent, the other is dishonest, and must be dealt with as a wrong-doer—be deprived of his property, and subjected to great embarrassment and unnecessary expense and loss?

What rights and interest does the purchaser acquire? and how does his purchase affect the other partner?

He stands in no better situation than the debtor himself. The solvent partner has a specific lien upon the property to liquidate the partnership debts, and upon the residue until all the equities between the partners are settled.

In a sale under execution against one partner, the vendee will be tenant in common with the other partner. Heyden *v.* Heyden, 1 Salk. 393. In West *v.* Skip, 1 Ves. 242, the Lord Chancellor says, "Then, as between one partner, and the separate creditors of the others, the law, and those two cases before mentioned, (referring to the case in Salkeld, and another in 2 Lord Raymond,) say, that this cannot

affect the stock any further than that partner could, whose creditors they are."

"The purchaser at sheriff's sale, becomes tenant in common with the other partner, and does not thereby acquire a right to possession of the partnership property, but takes it *cum onere*." Sitler v. Walker, 1 Freeman C. R. 77.

In Fox v. Hamerry, Cowp. 445, Lord Mansfield, in examining the question—What right, in law and justice, one partner has against another after a dissolution of the partnership, says, "It clearly is not to change the possession of specific effects. One partner may be a creditor of the partnership to ten times the value of all the effects. The other partner in that case only has a right to an account. No person deriving under the partner can be in a better condition." And quoting Lord Hardwicke, "If a creditor of one partner take out execution against the partnership effects, he can only have the undivided share of his debtor, and must take it in the same manner the debtor himself had it, subject to the right of the other partner."

In the case of Wilson v. Greenwood, 1 Swanston's Rep. 480, Lord Elden says, "When a partnership expires, whether by the death of the parties, or by effluxion of time, without special provision as to the disposition of the property, in all these cases, to which I may add, the bankruptcy of a partner, the partnership is considered, in one sense, as determined, but in a sense also as continued—that is, continued till all the affairs are settled; and as in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the court will grant a receiver; so in the course of winding up the affairs, after the determination of the partnership, the court, if necessary, interposes on the same principle."

Chancellor Kent, in considering the consequences of dissolution by death, notice, or other effectual modes, remarks, "But until the purpose of finishing the prior concerns be accomplished, the partnership may be said to continue; and if the object be in danger of being defeated by the unjusti-

fiable acts or conduct of any of the partners, a court of equity will interfere, and appoint a manager or receiver to conduct and settle the business." 3 Kent's C. 63; see also Peacock v. Peacock, 16 Ves. 51.

It does not follow, that because a partnership is dissolved and a partner entitled to an account, that therefore there must be an injunction and receiver. Where the dissolution taks place by a decree of the court, such consequences do generally follow. But why? Because, the same necessity which calls for a decree of dissolution, requires this further aid of the court. It is a common occurrence, of a partner to resort to a court of chancery to obtain a decree of dissolution, in a case where his own will would have effected it. The object of going to the court for a decree, is that it may be followed by the order for a receiver and an account. But the decree for dissolution cannot be obtained merely because one party desires it. A dissolution will be decreed only for misconduct, or abuse of trust and confidence, and where necessity calls for it. As a general rule, if the case is one which requires the court to decree a dissolution, it will justify an injunction and the appointment of a receiver.

But "there must be some actual abuse of the partnership property, or of the rights of a copartner, and not a mere temptation to such abuse which will induce the court to interfere." Henn v. Walsh, 2 Ed. Ch. Rep. 130; Glassington v. Thwaites, 1 Simon & Stewart, 124; Goodman v. Whitcomb, 1 Jae & W. 569; Littlewood v. Caldwell, 11 Price Ex. R. 97; Lawson v. Morgan, 1 Price, 303; Harding v. Glover, 18 Ves. 281. Lord Elden says, "I have frequently disavowed as a principle of this court, that a receiver is to be appointed merely on the ground of a dissolution of partnership. There must be some breach of the duty of a partner, or of the contract of partnership."

In the case of a dissolution by the sale or the voluntary assignment of the interest of one partner, the court will be governed by the same rules, in interfering with the other partner, as in the case of a dissolution by death.

On the dissolution by death, the surviving partner settles

the affairs of the concern, and the court of chancery will not arrest the business from him, and appoint a receiver, unless confidence be destroyed by his mismanagement or improper conduct. Carey on Part. 292; Gow, 356; 9 Paig, 178.

In the case of Evans' executrix *v.* Evans, the surviving partner was residing in England, and was settling the affairs of the partnership by an agent sent out to this country for the purpose. The bill was filed by the executrix of the deceased partner, but the court refused to interfere.

Mr. Justice Story (Story's Eq. Jur. sec. 678) remarks, that the English decisions do not distinguish between the case of an assignee of a partner, and that of an executor or admintrator of a partner, or of the sheriff, or if an assignee in bankruptcy.

In Field *v.* Taylor, 4 Ves. 396, Lord Mansfield says: "In law there are three relations: First, if a person chooses, for valuable consideration, to sell his interest in the partnership trade; for it comes to that; or if his next of kin, or executors take it upon his death; or if a creditor takes it in execution, or the assignees under a commission of bankruptcy. The mode makes no difference."

I adopt the rule, which I consider founded upon just and equitable principles, that a vendee at sheriff's sale, of the rights and interest of one partner, stands in no better condition in reference to the partnership matters, than such partner himself stood—that the rights which he acquires are at least not superior to those which devolve upon the representatives of a deceased partner—and that a court of chancery will not interfere with the other partner, in winding up the partnership, unless his gross misconduct calls for such interference.

Upon these principles, is there any thing in the case before us to warrant the interference of the court? Does the case made against the defendant, Chaplain, show such misconduct on his part, as to justify the court in dealing with him as a wrong-doer?

He is charged with fraud in the commencement of this partnership—that the conveyance of Carter's real estate, which had before been covered under the name of John

Hartshorne, Jr., was conveyed to Chaplain—and that the business was carried on in Chaplain's name, for the purpose of covering and concealing the interest of Carter in the business from his creditors—and to prevent such creditors from reaching the same by execution, or otherwise, Carter at that time being involved in pecuniary embarrassments.

This charge is as general in the bill, as I have here stated it. There is no allegation, that there were any judgments against Carter at this time, nor any intimation as to what extent he was involved in debt—there is no allegation that his interest in the partnership was in fact at any time concealed or denied, or that the complainant himself, or the creditors of Carter, or the public generally were ignorant of it. To a charge so general, and upon which, from the manner of its statement, so little reliance was placed to impeach the conduct of Chaplain, I consider the account given by the defendant, of the manner in which he became connected with Carter, and the reasons of his taking the title to the property and conducting the business in his own name, a satisfactory explanation and answer. Indeed, the complainant admits, that as soon as he made any inquiry as to the interest Carter had in the partnership, he ascertained what it was, and that the articles of copartnership were shown to him. When this was de does not state, though this is material.

It is charged that Chaplain is keeping improper books of account—that there are mistakes, omissions, alterations, and improper charges to the prejudice of the complainant, and that Carter has been permitted to draw large sums of money for his own individual use since the several levies under the executions against him.

The charge, as to the books, is very fully answered, and every impropriety in reference to the manner in which they have been kept denied—a regular book-keeper has been, and is still employed for the establishment, who has the sole control and management of the books.

And as to permitting Carter to draw large sums of money since the levies, there is no pretence by the bill that Chaplain in this, or in any other may, connived at Carter's with-

drawing any funds from the partnership, to defraud the judgment creditors, or to depreciate the value of the liens, by virtue of the executions and levies upon Carter's interest in the partnership. As to this charge, Chaplain answers, that as early as April last, Carter had drawn funds from the partnership beyond all his interest in the same, and that Chaplain then refused his consent to Carter's drawing any further funds; but without his knowledge and consent, Carter has, since then, appropriated to his own use funds outstanding, and others, to an amount of about six hundred dollars.

The only other charge in the bill impeaching the conduct of Chaplain, is as to the manner in which he is managing the property.

It is admitted the business is not worth carrying on, without the use of Blanchard's patent machine.

In December last, a fire occurred on the premises belonging to the partnership, by which all the patent machines, except the iron work, and considerable other personal property, and the principal buildings were destroyed. Since then the buildings have been rebuilt.

The bill charges, that the right to use the patent has been forfeited—that Chaplain, without the concurrence of Carter, is now expending a large sum of money, and incurring debts and liabilities to a large amount, in constructing machinery and fixtures which will be almost worthless, from the fact that when completed, they cannot lawfully be used.

The history which Chaplain gives in his answer respecting the patent, and which is fairly responsive to the bill, presents this whole matter in such a light as to make me extremely cautious in prejudging, or in any way prejudicing by the action of the court, the rights which, by his covenants with Carter, and Carter's connection with this patent right, Chaplain has acquired to use this machine. In view of the situation he has been placed in by Carter's conduct, I am unwilling to say that the expenditures Chaplain has made are unwise—that they have not been made in an economical way is not pretended. If the answer is true, the defendant's rights will not be impaired, or his interest be injuriously

affected. by any use which the defendant, Chaplain, is making of the property.

But it is insisted, that the case made by the bill and answer, shows that there are irreconcilable difficulties existing which make it necessary to have the affairs of the partnership settled, under the direction of, and by a person appointed by this court.

But look at the interest, and the rights of the complainant and of Chaplain, for Carter's are gone.

Chaplain has put into the partnership, together with what he paid Carter, upwards of ten thousand dollars. Out of the partnership earnings he has discharged liens on the property, and assumed liabilities to upwards of fourteen thousand dollars. The present value of the partnership property, as appraised, is twenty thousand eight hundred and thirty-six dollars and seventy-two cents, and the partnership liabilities are fifteen thousand six hundred and eighty-six dollars and forty-eight cents. Carter has drawn out upwards of eighteen thousand dollars, and Chaplain a little over ten thousand dollars. It is charged that Carter has overdrawn his interest some twenty-six dollars.

On the other hand, all that the complainant has risked is thirty dollars. It is not alleged, that he is in any way interested in the judgments, or that he has any claims against Carter, to secure which he was induced to make the purchase. It is to be presumed, that he gave an amount somewhat approaching to the value of Carter's interest. He made the purchase as a mere matter of speculation, and does not occupy a position before the court to entitle him to ask for any interposition, not a strict matter of right, which will tend to the injury or embarrassment of Chaplain.

The bill does not charge that Chaplain is insolvent, or involved in any pecuniary embarrassments, or that he is not fully able to respond for any interest, it may appear, upon taking the accounts, Carter was entitled to at the time of the purchase.

It does not appear that the complainant has ever called upon Chaplain to account, or that he had any reason to suppose, that if he had done so, Chaplain would not have given

him every satisfaction, and rendered an appeal to this court wholly unnecessary.

Chaplain now puts himself upon his strict right. He denies that the complainant is a *bona fide* purchaser, and that he ought to account to him.

The motion for an injunction and receiver is denied. The bill is retained, and if upon further investigation, it should not be made to appear, that the complainant is not a *bona fide* purchaser, the partnership accounts must be settled, and Carter's interest at the time of the sale ascertained. In the mean time, the whole matter will be under the direction of the court, and application may be made at any time, if the case demands it, for the protection of the property, or the appointment of a receiver.

SAMUEL NESBIT *v.* ST. PATRICK'S CHURCH and PATRICK MORAN.

If a defendant fails to notice his demurrer for argument, and the complainant omits to take advantage of the failure at the first term thereafter, he may do it at a subsequent term, without first taking an order on the defendant to bring it to argument, but in that case he should serve the rule to answer on the defendant before taking a decree *pro confesso*.

Where work has been done, and materials provided, under a written contract for building a church, and partial payments have been made, the precise amount of which the contractor does not know, and he claims a balance due for the work and materials, and that he has sustained damages by being improperly prevented from finishing his contract, he cannot sustain a bill in chancery praying for an account, a discovery of the payments made to him, and a decree for the balance due him for the work and his damages.

The court cannot take jurisdiction of the case on the ground of account, or of discovery, or of preventing a multiplicity of suits.

This cause was heard before the Chancellor at February Term, 1852, upon demurrer to the bill. The questions involved sufficiently appear by the Chancellor's opinion.

Mr. A. Gifford in support of the demurrer, cited 2 Daniel Ch. P. 62; 2 Mad. Rep. 289; Story's Eq. Pl. sec. 74; 2 Wash. Rep. 213; Mitford's P. 46; 2 Dick. 489; 1 Mad. Rep. 212; Cooper's Eq. Pl. 200; 4 Joh. Ch. Ca. 294; 2 P. Wms. 591; 2 Ves. 343; 10 ib. 546; 4 Black. 359; Holcomb's Eq. 73–74.

Mr. Runyon and *Mr. A. Whitehead*, contra cited 3 Joh. Ch. Rep. 351; 2 Caine's Ca. in E. 38, 52; 9 Johs. C. Rep. 407; 4 Cowen, 719; 17 Joh. Rep. 374; Str. Eq. In. sec. 451; Edwards on Parties, 73, 49; 1 Dan. Ch. P. 449.

THE CHANCELLOR. This cause was heard upon demurrer to the bill. The counsel of complainants objected to the defendant's being heard upon demurrer, on the ground that an

order overruling the demurrer had heretofore been made, and which had not been vacated.

The bill was filed September 18, 1849, and this demurrer on the 19th of December of the same year.

The demurrer was regularly noticed for argument and put on the list of causes in March Term, 1850. The following June Term it was not noticed, and the complainant did not take advantage of the default at that term.

On the 23d of October, 1850, of the term of September, 1850, the complainant took an order overruling the demurrer, and for the defendants to answer within forty days. The order was not served. No answer was put in, and at the following December Term, 1850, the complainant took a decree *pro confesso*, with an order of reference to Theodore Frelinghuysen, Jr., Esq., one of the masters of the court, to take and state the accounts between the parties as prayed for in the complainant's bill.

On the 6th of February, 1852, Patrick Moran, one of the defendants, made his affidavit, setting forth that the order overruling the demurrer was a surprise upon the defendants and their counsel, occurring in consequence of a misapprehension of an arrangement made between the solicitors of the respective parties as to the argument of the demurrer.

Upon this affidavit notice was given for setting aside the decree, and Chancellor Halsted, on the application of the defendants, made an order to this effect, that notice having been given of such application all further proceedings on the decree should be stayed until the further order of the court; thus the cause has since stood, until now noticed for argument on the demurrer, without the defendants having taken any further measures to set aside the decree.

The argument was heard with the understanding and arrangement of counsel, that the complainant should have the benefit of his decree, or the court decide the cause upon the demurrer, as the court might consider right and proper under the circumstances.

The defendants insist the decree is irregular, and should be vacated; that it was taken contrary to the practice of the

court; that the complainant was entitled to his order overruling the demurrer at the June Term, 1850, for default in the defendants not having noticed it at that term, and having failed to take it at that time, he could not take it at a subsequent term, without first taking an order for the defendant to bring his demurrer to hearing, and that the decree *pro confesso* having been founded on an order irregularly taken, the decree cannot stand.

Such has not been the practice, as far as my own experience goes, and I have been unable to ascertain, upon inquiry, that it has been considered by others as the practice of the court. We have no rule upon the matter. The only one in any respect analogous is that regulating taking of decrees *pro confesso*, and which is this: where a complainant omits to take a decree *pro confesso* at the first term at which he is entitled to it, he shall not thereafter move such decree until he has first taken and served an order on the defendant or defendants, if in this State, to file their answer or answers at such short day as the court may appoint, unless in cases where the time for final decree in the same cause against other defendants shall not have arrived. The rule, it will be seen, does not apply to orders overruling demurrers. I think, where the complainant takes a rule overruling a demurrer at a subsequent term to that in which the default occurs, he should serve his rule upon the defendant before taking his decree. Yet, I believe, such has not been the practice. I should, however, order service in such a case, if my attention was called to the circumstances under which the order was taken.

But in the case before us the affidavit of Mr. Moran shows that the reason why the demurrer was not noticed, was, in consequence of an arrangement made between the solicitors of the respective parties, that there should be a hearing of the cause upon the demurrer before the Chancellor at his chambers in Newark.

There has been too much delay on the part of the defendants, first, in not bringing the demurrer to hearing, and again in not following up the rule to show cause why the decree *pro confesso* should not be set aside. I should not have been

willing to deprive the complainant of the advantage of his decree if on looking at the bill I could have satisfied myself he had a case which entitled him to a standing in the court.

The bill shows that the complainant entered into a written contract with "Saint Patrick's Church," a body corporate under the laws of this state, for doing the mason work in the erection of a new church edifice at the city of Newark. He sets out the contract, by which it appears that the corporation had the privilege, if at any time during the progress of the work they should be short of funds, to give the contractor, the defendant, notice, and suspend the work. The complainant commenced working on the 25th of July, 1848, and worked about two months. The work was suspended, on notice, in conformity with the provision of the contract referred to.

On the 4th of November, 1848, the corporation gave him notice to resume the work. He alleges that the weather was then unfavorable, and complains that in July following, eight months after giving him the notice, he, in the mean time never having tendered himself ready to proceed with the work, the corporation employed another person to complete the work.

The complainant alleges the work done by him was worth fifteen hundred dollars; that during the period he was at work he received various sums of money on account of his work, of which he has, to use his own language, no *reliable* memoranda, and cannot tell with *entire certainty* to what sum in the aggregate the same amounted.

He further alleges that Patrick Moran, who was then the president of the corporation, has the receipts in his custody and possession. There is no allegation, however, that the complainant ever called on Mr. Moran for the vouchers or receipts, or for copies of them, or for information as to their contents.

He further alleges that he verily believes there is a considerable sum of money due him for work done and materials found, and that he has sustained damage by breach of the contract on the part of the defendants, "Saint Patrick's Church," to the amount of one thousand dollars.

The bill prays for an account—for discovery as to the receipts and vouchers—and that the respondents be decreed to

pay the amount due for such work, and the damages for breach of the contract.

Upon what ground can this court take jurisdiction of the case?

Surely not on the ground of account. There has been work done by the complainant under a written contract, and some payments have been made to him on account of this work. But it is not pretended there is any thing intricate in these accounts, nor is any reason given why they ought to be settled in a court of chancery. If this bill can be maintained on the ground of the accounts between the parties, then a court of chancery has jurisdiction of every case when a debt has been contracted and payments made upon it.

Courts of Chancery assumed the jurisdiction in cases of accounts, in consequence of the inadequacy of the remedy at law. The bill in equity is the substitute for the action of account at law, which, in consequence of its intricacy, and the delay and expense attending it, and even then failing to do complete justice, has become obsolete.

Can this court get jurisdiction of the case either upon the ground that by reason of the complexity of the accounts the relief at law is imperfect or inadequate, or on the grounds of *discovery*, or of suppressing multiplicity of suits?

So many perches of mason work have been done at a specific price per perch; the defendants have made some payments, but for aught that appears in the bill of complaint not more than three, and such are the accounts to be settled between the parties. It would be a mere pretext for assuming jurisdiction and of transferring the forum of litigation from a court of law to a court of equity, to say that there is any propriety in the court's retaining the case by reason of the nature of the accounts; and there is just as little reason for retaining it on the ground of discovery. What discovery is really needed? None but the contents of two or three receipts and vouchers of payments given by the complainant to the defendant, the knowledge of which it is not pretended are now needed for any specific purpose by the complainant, and which the defendants can use only to reduce the amount

which may be due on taking the accounts. If they are lost, or are not forthcoming at the proper time, the complainant can sustain no injury, but the loss will fall on the defendants.

The peculiar power of this court to compel a discovery is not required in the case, that the ends of justice may be attained. Is it invoked as a mere pretence to give the court jurisdiction and change the forum of litigation?

Of what advantage can it be to the complainant to have the discovery he asks? He did not do the work, nor were these payments made through the agency of others. To know the exact amount of the payments before trial cannot be of any advantage to the complainant.

PETER HOWELL v. THOMAS ASHMORE.

In the case of a bill for mere discovery, if it appears reasonable that the complainant should be entitled to the disclosure, and no principles of law, or equity, are violated in enforcing it, the court will not be as nice in the application of technical rules as when an injunction, or relief, is asked for.

So in a bill for discovery only, it is not necessary to aver, that the discovery is absolutely necessary, or indispensable, to the defence. It will be sufficient to state and show that it is material evidence.

Nor is it necessary to allege in the bill, that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought; for he is entitled to it if it is merely cumulative evidence of material facts.

A mere clerical mistake of a single figure, the court would permit to be corrected instanter upon the suggestion, unless by any possibility the defendant had been misled by it.

A *bona fide* purchaser without notice, and for a valuable consideration, is entitled to have his title protected by this court, nor will he be compelled to discover anything which will invalidate that title. But when the defendant is charged with a fraud, and that he has procured a title fraudulently, and is fraudulently setting it up to defeat the complainant, it is the peculiar jurisdiction of the court of chancery to compel such fraud-doer to disclose the fact alleged as a fraud, and all the circumstances attending the act, in order that the court may determine whether those circumstances establish the fraud or not.

It is a proper object for a bill of discovery to ascertain, in a case where the defendant's title can only prevail, upon the ground of his being a *bona fide* purchaser, without notice of the plaintiff's title, whether he *had such notice*, and to call upon him to disclose all the circumstances which may go to probe his conscience upon that point.

* The act of the Legislature of this State, of March 1st, 1849, permitting the plaintiff to call on the defendant as a witness upon the trial, does not deprive the plaintiff of the right to the discovery before trial by exhibiting his bill in this court. The Supreme Court is not competent *to grant the same relief* which this court is able to afford the plaintiff in this proceeding.

It is a general rule regulating the practice of the court of chancery, that a bill of discovery filed in this court to aid in the prosecution of a suit at law, cannot be maintained against one *who might be a witness in the suit.*

But the statute of 1849 has introduced a new principle unknown to the common law; a new case has arisen to which the rule could not have been applicable when adopted. It is, therefore, a question addressed to the sound discretion of the court.

* The "act concerning evidence," reported by the Law Commissioners, and passed in 1855, contains a section which avoids the necessity of filing a bill in chancery for discovery in such cases.—REPORTER.

The statute ought not to deprive the plaintiff of his right to file his bill to aid him in the prosecution of his suit at law.

This bill was filed by the complainant, seeking discovery in aid of his prosecution of a suit at law. The bill alleges, that Sarah Milward, wife of John Milward, as the heir at law of her father, became entitled to certain real estate in the county of Mercer. That on the seventeenth day of September, 1814, the said John and Sarah, for the consideration of $100, granted and conveyed a part of the same to Joseph Ashmore, which is the land in question between the parties to this suit. That the deed was acknowledged before a proper officer, but that in taking the acknowledgment, the officer did not certify that the said Sarah was examined privately and apart from her husband.—That Joseph Ashmore entered into the possession under the deed, and so continued until the 24th of June, 1816, when he sold, for a valuable consideration, to James Ashmore, the brother of defendant, who entered into the possession. That James, being about to leave the State for a considerable time, and wishing to make some provision for the care of his aged father, permitted the defendant to take possession of the premises, under an agreement to cultivate them for the mutual support of himself and his father. That under that arrangement the defendant entered and kept the possession until the death of his father, in 1846.

That in December, 1845, James Ashmore, for the consideration of $200, sold and conveyed the premises to the complainant, and which deed was duly acknowledged and recorded. That at the time of his purchase the complainant did not know of the defect in the acknowledgment of the deed from Milward and wife. That afterwards, discovering the defect, the complainant applied to Mrs. Milward—told her the difficulty, and thereupon, without hesitation, on the 24th day of June, 1847, she, for the nominal consideration of $1, duly executed and delivered to complainant a deed for the premises, which was recorded on the 22d day of

April, 1848. That then the complainant commenced an action of trespass and ejectment for the land, and in July term of the Supreme Court, the defendant applied, and entered into the usual consent rules to defend as the owner; that on the 20th of September, 1847, the defenant, being fully apprised of the fact that the said Sarah M. had given the last named deed to the complainant, but finding it was not recorded, procured her to execute a deed to him, of the date last named, purporting a consideration of $170, and which deed, on the next day, was recorded.

The bill further charges, that the defendant did not pay any consideration for the conveyance to him, and at the time he obtained it, had full knowledge of the complainant's title. That the deed to defendant was privately and secretly executed, and that defendant has refused to give any information in relation thereto; that Sarah M. resides out of this State, and that complainant cannot discover whether she is aware that at the time when she made the deed to him, he had any knowledge of the prior deed to the complainant, nor has complainant been able to discover who was present when the deed to defendant was executed.

The bill then prays a discovery as to the knowledge of the defendant of the complainant's deed from Sarah Milward, at the time of the execution of her deed to him, and the consideration upon which, and the circumstances under which it was executed.

The defendant has demurred to the bill.

Mr. Dayton for demurrer.

Mr. Beasley contra.

THE CHANCELLOR. This is a bill for discovery only. The complainant asks the discovery in aid of his prosecution of a suit at law, instituted by him against the defendant in the Supreme Court, and for the purpose of using the disclosure upon the trial of the said suit. No interference with that

suit is asked, nor is relief prayed for. The principles applicable to a bill for discovery only, are in some respects different from those which govern the court, where the bill prays for an injunction to stay proceedings at law, or in any way to interfere with such proceedings, until the bill is answered; or where, in addition to the discovery, relief is prayed for. In the case of a bill for mere discovery, if it appears reasonable that the complainant should be entitled to the disclosure, and no principles of law, or equity, are violated in enforcing it, as the complainant must pay the costs of the suit, whatever may be the defendant's answer, the court will not be as nice in the application of technical rules as where an injunction, or relief, is asked for. Seymour *v.* Seymour *et al.*, 4 Joh. C. R. 409; Bishop of London *v.* Fytche, 1 Brown C. C. Rep. 69.

For instance, in a bill for discovery only, "it is not necessary to aver, that the discovery is absolutely necessary, or indispensable to the defence. It will be sufficient to state and show that it is material evidence. Thus, for example, it is not necessary to allege in the bill, that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought; for he is entitled to it, if it be merely cumulative evidence of material facts. It would be otherwise, if the bill should not only ask discovery, but should ask relief in equity." Story's Eq. P. sec. 324.

An objection was made to this bill, because it does not sufficiently aver, that the complainant cannot make proof of the facts of which discovery is sought without the aid of this court.

If the interference of this court was asked with the suit at law, then perhaps the bill, or affidavit, ought to have stated the belief of the complainant, that the answer would furnish discovery material for the defence, and that the complainant had no means of obtaining the facts without such discovery. (4 John. C. Rep. 411.) But no interference is asked for; and besides, though there is no direct averment that the disclosure is material and requisite, the case made by the bill, and which the demurrer admits, shows manifestly, the mate-

riality and importance of the facts of which discovery is asked. As regards the most important fact, and the one which it is the principal object of the bill to reach, to wit, whether at the time the defendant obtained the deed from Mrs. Milward, he had knowledge of the plaintiff's deed from her of the 24th of June, 1847, that is a matter so peculiarly within the exclusive knowledge of the defendant, that it might almost be considered as superfluous to aver, even if formality required it, that the plaintiff had not the means of obtaining the fact without such discovery.

The bill alleges, that the deed from Sarah Milward to the defendant, and which he sets up to defeat the plaintiff's title, was privately and secretly executed, and that the defendant has at all times refused to all persons to give any information in relation thereto—that Sarah Milward resides out of the State, and that the complainant cannot discover whether she is aware that the defendant, at the time when she made the deed to him, had knowledge or information of the deed to the complainant; and that the complainant has been unable to discover who were present at the execution of the deed.

With regard to all the other facts and circumstances of which the defendant is called upon to make disclosure, they all relate to, and bear upon the material question—whether or not the defendant was a *bona fide* purchaser without notice?

I think the bill sufficiently shows the materiality of the facts to the plaintiff's case at law, and also that he cannot safely rely upon any testimony from other sources to supply the evidence.

It is again objected, that the complainant does not show his action at law was commenced subsequent to the time when his title accrued. It is true this is not very explicitly stated, but it is evident the counsel who drew it supposed that it so appeared by the bill. There is certainly a confusion as to dates arising from want of care. The bill states, the complainant commenced his action of ejectment, and such proceedings were had therein, that in the July term of the

Supreme Court in the year *last aforesaid*, the said Thomas Ashmore appeared, &c. The year "*last aforesaid*," in the bill, is the year 1848, and yet it is stated that the cause was noticed for trial in September, 1847. There is certainly a mistake as to dates.

But the complainant after setting forth the manner in which his title accrued, states: that having then become entitled to the said premises he went to take possession, and the defendant refusing to deliver the possession he commenced his suit. The whole statement of the case by the bill shows, I think clearly, that the suit was commenced after the plaintiff's title accrued, but before he had his deed recorded. A mere clerical mistake of a single figure the court would permit to be corrected *instanter* upon the suggestion, unless by any possibility the defendant had been misled by it.

It is further insisted in support of this demurrer, that the subject matter is not one entitling the complainant to a disclosure from the defendant; that a defendant cannot be compelled to discover his own title; that the prayer of the bill is not simply a discovery as to whether the defendant had notice, but of the consideration the defendant gave for the property, and of other matters attending the purchase.

"One of the fundamental rules of this branch of equity jurisprudence is, that the plaintiff is entitled only to a discovery of what is necessary to maintain his own title, as for example, of deeds under which he claims. But he is not entitled to have a discovery of the title of the other party from whom he seeks the discovery." Sto. Eq. Ju. sec. 317.

In this case the bill does not seek a discovery of the defendant's title, nor of the defence he seeks to set up against the plaintiff's right of recovery. But the complainant alleges that the defendant has procured a title, which title the complainant sets out in his bills, and insists that such title ought not to prevail against his, and that the defendant procured his title with notice of the complainant's prior title. All he seeks to discover is, whether the defendant had the notice at the time of his purchase.

A *bona fide* purchaser, without notice, and for a valuable

consideration, is entitled to have his title protected by this court, nor will he be compelled to discover any thing which will invalidate that title. But when the defendant is charged with fraud, and that he has procured a title fraudulently, and is fraudulently setting it up to defeat the complainant, it is the peculiar jurisdiction of a court of chancery to compel such a fraud-doer to disclose the fact alleged as a fraud, and all the circumstances attending the act, in order that the court may determine whether those circumstances establish the fraud or not.

The defendant is called upon by this bill to state whether he had notice of the complainant's deed, and the circumstances under which he procured his own deed, in order that by them it may be determined whether he is a *bona fide* purchaser without notice. The disclosure sought is as to the notice, and inquiry is made as to the consideration he paid, and of other circumstances only as they affect this point. They all bear upon the question of notice, and are introduced to test the defendant's conscience as to that matter.

It seems never to have been questioned but that the object which is sought by this bill, is a proper one for discovery.

A defendant may object to the discovery that he is a *bona fide* purchaser of the property for a valuable consideration, without notice of the plaintiff's claim. To entitle himself this protection, he must not only be a *bona fide* purchaser, and without notice, and for a valuable consideration, but he must have paid the purchase money. Story's Eq. Ju. sec. 1502. But was it ever objected that he could not be compelled to disclose whether he was a *bona fide* purchaser without notice, or what consideration he gave, or the circumstances under which he purchased?

"If a defendant has in conscience a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title, this circumstance in the situation of the defendant renders it improper for a court of equity to compel him to make any discovery which may hazard his title; and if the matter appears clearly on the face of the bill, a demurrer will hold. The most obvious case is

that of a purchaser for a valuable consideration without notice of the plaintiff's claim." Mitford's Pleading, 162.

But upon the case made by this bill, has this defendant, in conscience, a right equal to that claimed by the complainant? Is it not most unjust that a title acquired in the manner as it is alleged the defendant's was, should be set up and prevail? The defendant has no equity whatever. He admits by his demurrer the fraud he has practised, and insists that the court should aid him in taking advantage of it, by extending to him the same protection that a man, holding an honest title, would have a right to claim.

In Jerard *v.* Sanders, 2 Ves. J., 187, the bill was filed for discovery of deeds relating to the plaintiff's title, and to restrain proceedings in ejectment. The bill charged constructive notice of a settlement in the party under whom the defendant claimed. The defendant pleaded purchase for valuable consideration, and averred that J. D., under whom he claimed, had not to his knowledge or belief any notice of the title set up by the plaintiff. The Lord Chancellor says, he must set forth the facts charged in the bill, from which the court will construe notice. He assumes to himself the proposition. He judges what is constructive notice, and then denies that to his knowledge and belief he had constructive notice. The bill does not impute direct notice to him. He must let the court judge of that. The plea was overruled. The case is further reported in the same book, 454. The defendant answered, and fully and in the most precise terms denied all the circumstances alleged, from which notice might be inferred. He showed he was a *bona fide* purchaser without notice, and then the Chancellor said that against such a purchaser the court will not take the least step imaginable, and no advantage the law gives him shall be taken from him. But it was not set up in that case that the subject matter of which discovery was sought, was one of which the defendant could not be called upon to make disclosure, on the ground it was discovering his own title.

In 14 Ves. 57, Claridge *v.* Hoare, Lord Eldon says: "It is then said this plea (referring to the plea in that case) should

be supported by an answer. Such a plea does not require the support of an answer as a plea of purchase for valuable consideration, without notice does. That plea requires the aid of an answer, the bill insisting upon notice and charging facts to make that out. The defendant must answer, either admitting, denying, or qualifying all the circumstances upon which it is contended, that if the defendant will speak, notice, though denied, will appear."

It appears to me very clear, that it is a proper object for a bill of discovery, to ascertain, in a case where the defendant's title can only prevail upon the ground of his being a *bona fide* purchaser without notice of the plaintiff's title, whether he had such notice, and to call upon him to disclose all the circumstances which may go to probe his conscience upon that point.

In support of this demurrer, it is further insisted, that under the act of the Legislature of this State, of March 1, 1849, the plaintiff can call upon the defendant as a witness upon the trial of the suit in ejectment, and that therefore this bill is objectionable upon two grounds:

1st. That this court is called upon to assist a suit in another court competent to grant the relief here sought.

2d. That you cannot have a bill of discovery in aid of a suit pending against any one who is a competent witness in that suit.

As to the first ground. The principle is correctly laid dawn in Story's Eq. Ju. § 1495; in Cooper's Eq. P., ch. 3, p. 191, and in Mitford's Plead. 52, that in the case of suits merely civil, in a court of ordinary jurisdiction, if that court can itself compel the discovery required, a court of equity will not interfere. The cases referred to in support of the principle are those of Dunn and others *v.* Coates and Balguy, 1 Atk. Rep., 288, and an anonymous case in 2d Ves., 152, which were cases where the plaintiffs sought a discovery in aid to the ecclesiastical jurisdiction, and in which cases the discovery was denied on the grounds as stated by the Lord Chancellor, that "the coming into this court in aid of the ecclesiastical jurisdiction is always denied here," and

the party does not there want it, "because he may exhibit articles in that court, and have an answer on oath, which is the constant method there."

It would seem that in the ecclesiastical courts, the party could exhibit articles in the nature of a bill of discovery, and have an answer on oath, which would afford him the same relief as a bill of discovery would in the Court of Chancery.

But is the Supreme Court, where this suit is pending, to assist which this bill has been filed, competent to grant the same relief which this court is able to afford the plaintiff in this proceeding?

That court can compel no discovery by any proceeding in the nature of a bill of discovery. It can compel the defendant to answer as a witness on the trial of the cause if called upon by the plaintiff. But the disclosure he may make then may be of no avail to the plaintiff. The plaintiff has a right to the discovery, before the trial, to aid him in preparing to meet the very case the defendant may make by the disclosure. A party may exhibit his bill before his suit is commenced, so as to enable him rightly to frame his action and declaration.

Story's Eq. Ju., §1495, and cases cited in the note.

In Story's Eq. Ju., § 1486–1487, the means provided by the Roman law for obtaining the oath of parties is stated. Interrogatories in writing were propounded which were answered by the other party under oath, and the relief afforded was as effectual as that obtained by a bill of discovery in a Court of Chancery.

The mode of proceeding in the ecclesiastical and civil courts is concisely pointed out in Story's Eq. P., § 850: "In the civil law the defendant first puts in his defensive allegation to the claim made by the plaintiff, and after an answer to that is put in, the plaintiff propounds, in a sort of supplemental libel, called the *libellus articulatus*, his interrogatories respecting the charges made in the positions of the plaintiff, as they are called (that is) in his bill of complaint; and the defendant then responds to those interrogatories. In the

ecclesiastical courts, where also the defendant is required to make an answer or discovery upon oath, the answer to the interrogatories is in a wholly distinct instrument from the responsive allegation (as it is called) to the libel which contains the defence of the defendant.

But the remedy afforded by our statute was not intended to supply the place of a bill of discovery. It does not afford the adequate relief, for it does not meet the wants of the party.

As to the other ground, that you cannot have a bill of this nature in aid of a suit at law against one who is a competent witness in the suit.

The general rule is, that it is a good objection to a bill of discovery that it seeks a discovery from a defendant who is a mere witness and has no interest in the suit. But the rule has its exceptions.

Story's Eq. § 1499; Cooper's Eq. P., 200.

Whenever the rule is laid down, this reason is always given for it: that there is no ground for a bill of discovery since his answer would not be evidence against any other person. The reason is not applicable here.

One exception to the rule is, the case of making the agents, officers and directors of a corporation, parties. There are reasons given for this exception in the authorities where such bills have been sustained, but no better reasons, nor as good as those which may be suggested, why the case before us should not be an exception to this general rule.

In the case of Glasscott *v.* Copper Miners' Company, 11 Simons R., 305, the doctrine was firmly established that a bill for discovery merely may be maintained against a corporation and its officers.

If these objections prevail, it strips the court very much, if not entirely, of its jurisdiction, in cases of this kind.

As the object of this jurisdiction is to assist and promote the administration of public justice in other courts, bills of discovery are greatly favored in equity, and will be sustained in all cases where some well founded objection does not exagainst the exercise of the jurisdiction. Story's Eq. § 1488.

Now, the statute of 1849, was passed for the benefit of the party who might see fit to call upon his adversary in a suit to testify as a witness; but if this court should determine that the statute deprives the plaintiff in this suit of the benefit of this bill, and thus compels him to resort to his adversary as a witness on the trial, this statute, instead of proving, as it was intended, an advantage in the prosecution of his suit, may operate greatly to his prejudice. It compels him to make the defendant a witness not only as to the simple fact about which he wishes to interrogate him, but makes him a witness in his own cause, competent to give testimony on his own behalf.

But this principle which has heretofore governed courts of equity in entertaining bills of discovery, is not an inflexible rule, and one which cannot, or ought not, to be subservient to any new exigency that may arise in the administration of justice.*

Here is presented a new question. The Legislature has not by positive act abolished or limited the jurisdiction of this court as to bills of discovery, but has introduced a new principle unknown to the common law. A party in a suit may now call upon his adversary as a witness. It is a general rule regulating the practice of the Court of Chancery, that a bill for discovery could not be maintained against one who might be a witness in the suit. It is a rule of policy, founded upon good and substantial reasons. Under the peculiarity of this statute, a new case has arisen, one to which

* Story, in his Eq. Ju., § 64, in speaking of the jurisdiction of the Court of Chancery says: One rule is, that if originally the jurisdiction has properly attached in equity in any case, on account of the supposed defect of remedy at law, that jurisdiction is not changed or obliterated by the courts of law now entertaining jurisdiction in such cases, when they formerly rejected it. This has been repeatedly asserted by courts of equity, and constitutes, in some sort, the pole-star of portions of its jurisdiction. The reason is, that it cannot be left to courts of law to enlarge, or to restrain the powers of courts of equity at their pleasure. The jurisdiction of equity, like that of law, must be of a permanent and fixed character. There can be no ebb or flow of jurisdiction dependent upon external changes. Being once vested legitimately in the court, it must remain there, until the Legislature shall abolish or limit it; for without some positive act, the just inference is, that the legislative pleasure is, that the jurisdiction shall remain upon its old foundation.

the rule referred to could not have been applicable when it was adopted, for such a case could not then have arisen. We have now to deal with it, and it is a question addressed to the sound discretion of the court, whether the ends of justice will be best promoted by making a case like that before us an exception to the rule.

I do not think that this statute ought to deprive the plaintiff of his right to file his bill in this court to aid him in the prosecution of his suit at law. I do not think that he should be compelled to resort to the alternative of making the defendant a general witness in the suit, or be deprived of having the benefit of a disclosure before the trial, so that he may prepare himself to meet the facts which may be presented by the disclosure which he seeks.

Let the demurrer be overruled with costs.

JOSHUA RAWNSLEY and ANDREW BARRICKLO *v.* THE TRENTON MUTUAL LIFE INSURANCE CO.

The powers conferred upon this court by the act to prevent frauds by incorporated companies, are *extraordinary* powers, and are to be exercised with caution, and only when the circumstances of the case and the ends of justice require it.

Nor is the Chancellor bound as a matter of course to issue the injunction, although it is made satisfactorily to appear *that the company is insolvent*; but he must exercise his best discretion and exert the powers conferred for the safety of the public, and the advantage of the stockholders and creditors.

The bill, or petition, must set forth the facts and circumstances of the case. Affidavits and proofs may be read, but for no purpose except to sustain the case made by the bill, and by the opposite party in its disproof and denial.

It will not do to simply charge that the company is insolvent, and then take affidavits to show facts and circumstances not alluded to in the bill, to make out such insolvency.

Motion to restrain and injoin refused, where the case made by the pleadings and the proof corresponding therewith, did not justify the court in declaring the company insolvent, and subjecting it to the provisions of the act to prevent frauds by incorporated companies.

This was a proceeding under the "Act to prevent frauds by incorporated companies." The bill was filed by a creditor and a stockholder of the company, and the complainants now applied for an injunction to restrain the defendants from exercising their corporate franchises, and for the appointment of receivers to wind up its concerns.

Messrs. *Beasley* and *Halsted* for application.

Dayton and *Vroom* contra.

THE CHANCELLOR. This bill is filed by Joshua Rawnsley, a policy holder, and as such, by virtue of its charter, a member of "The Trenton Mutual Life and Fire Insurance Company," and by Andrew Barricklo, who alleges himself to be a creditor of the said company.

The proceedings are under the act entitled "An act to prevent frauds by incorporated companies," and I am asked

now to declare this company insolvent, and to appoint receivers to wind up its concerns.

By virtue of the general equity powers of the court, this bill could not be maintained. The relief sought for is under and by virtue of the statute which must guide the court in its decision of the case.

The court is authorized by the act, whenever an incorporated company has become insolvent, by petition or bill, exhibited by a creditor or stockholder, setting forth the facts and circumstances of the case, to hear the matter in a summary way, upon the affidavits, proofs and allegations by or on behalf of the parties. If upon such inquiry it shall be made to appear that the said company has become insolvent, it shall be lawful for the Chancellor to restrain the company and its officers, by injunction, from exercising the privileges and franchises granted, and if the circumstances of the case, and the ends of justice require it, to appoint receivers, &c.

The powers conferred upon the court are extraordinary powers, and are to be exercised with caution, and only when the circumstances of the case and the ends of justice require it.

Where a creditor, or stockholder, comes into court under this act, it is not his particular grievance the court is to redress, or his individual interest that is to be protected; but the very object of the act is to protect the public at large from imposition, and to promote and secure the general interest of the stockholders and creditors.

Nor is the court bound, as a matter of course, to issue the injunction, though it is made satisfactorily to appear that the company is insolvent. The Chancellor must exercise his best discretion, and exert the powers conferred, for the safety of the public and the advantage of the stockholders and creditors.

Nor has the Chancellor any right to act in the premises except on the case made before him. The bill or petition, the act expressly says, must set forth the facts and circumstances of the case.

Affidavits and proofs may be read, but for no purpose ex-

cept to sustain the case made by the bill, and by the opposite party in its disproof and denial. It will not do simply to charge that the company is insolvent, and then take affidavits to show facts and circumstances not alluded to in the bill, to make out such insolvency. It is no trifling matter for the court, where the Legislature have incorporated a company with extensive powers, by the exercise of which a large amount of capital has become employed, and in which thousands of our citizens have become interested and their property involved, to strip it in a summary way of all its franchises and privileges, and determine the rights of individuals connected with it. It is a case where the court is to exercise great caution; and I think I may safely say, where a single stockholder, together with a creditor of the company, files a bill under this act, if the bill, taking all the facts and circumstances stated as true, will not justify the issuing of an injunction, no affidavits, or proofs, respecting collateral matters, though they tend to prove the company insolvent, will justify the court in granting the prayer of the bill. The complainant may amend his bill and make a case upon which the court can act. But it would be in violation of the well-established practice of this court, and I think, unjust, for the court to exercise the powers conferred by this act of the Legislature, unless the facts and circumstances of the case, as set out in the bill, will warrant it. It is a summary proceeding, and in its nature and effect, a final hearing upon its merits. By every principle of practice and pleading, the proofs must be pertinent to the issue: *secundum allegata.*

It is very proper in a case of this kind, when there has been any fraudulent conduct on the part of the directors or agents of the company, any misapplication of funds or violation of trust, to set out such acts and violations of duty in the bill, not because the court can upon any or all of these grounds grant the relief contemplated by the act, but because they have a bearing upon the question at issue, and give point and strength to the circumstances relied upon to make out the insolvency of the company.

But it is not competent, where there are no corresponding charges in the bill, to impugn by affidavits, the character or conduct of the directors or agents of the company, and make a case upon which the court is to act, not even alluded to in the bill of complaint.

These remarks are made because they have a direct bearing upon the case in hand.

This company was incorporated by an act of the 5th of February, 1847, and the privileges and franchises conferred upon it my be summed up in a few words. It has power to insure lives, and to make all and every insurance appertaining to or connected with life risks, of whatever kind or nature, and also to insure all kinds of property, both real and personal, against loss or damage by fire. And the act would seem to confer power enough to devise and contrive, at the discretion of the directors, any and all schemes to insure life risks, and against fire, and to any extent the public might see fit to embark in the risk. There are no restrictions in the charter, except that the company is subject to those contained in the act entitled "An act concerning corporations," and which in this case amounts to little or nothing, in limiting the discretion of the directors in the exercise of the powers conferred by the charter.

By the 2d sec. of the act, it is declared that all persons insured in the association, while they so continue, shall be deemed and taken as members thereof.

Joshua Rawnsley, one of the complainants, effected an insurance on his house in the city of Trenton for the sum of $3,000, for which he paid $12 cash, and gave his premium note for $120, on which the $12 was credited.

Andrew Barricklo, the other complainant, had an insurance upon his store goods to the amount of $3,000. His goods were destroyed by fire, and he claims to be a creditor to the amount of this insurance.

Do these complainants make out a case by their bill to justify the court in declaring the company insolvent?

The bill charges distinctly that the company is insolvent.

But what are the facts and circumstances stated to sustain the charge?

Let us look first at the general, and then at the specific allegations.

It is charged, "that the said The Trenton Mutual Life and Fire Insurance Company, on or about the 21st day of April, 1852, stopped payment, and stopped carrying on the business of insurance, and have neglected and refused to pay their losses for want of funds, when the same were presented for that purpose, and neglect and refuse to pay their just debts when demanded within the usual hours of business, and have suspended from the time last mentioned the ordinary business of the said company for want of funds to carry on their business."

Now, I may remark generally, it was never in contemplation of the Legislature, that this company should transact business with the promptness and punctuality of a bank, and should, during what are called business hours, meet any pecuniary demand against them at the moment it should be made at their counter. So far from it being contemplated that they should at all times have funds on hand to meet demands against them, it is in express terms provided by their charter, that "if at any time it shall so happen that there shall be just claims on the corporation for losses sustained, to a greater amount than they have funds on hand to discharge, in such cases the directors, for the time being, shall, with all convenient expedition, proceed to assess such deficiency in a rateable proportion on the members of the association."

The allegations referred to are very pertinent where the bill is exhibited against a bank.

It is an evidence of insolvency for a bank to refuse to transact business during the usual hours, and a refusal to redeem their bills, pay deposits, and meet the calls upon them promptly, are, from the nature of their business, strong evidences of insolvency.

But in this case the complainants stop short of making out a case that could be required even against a bank. What

evidence is there, either in the bill or *aliunde*, that this company have stopped payment, or stopped carrying on their business, or have refused to pay any just debt for want of funds, or have ever for any reason whatever, refused to pay a just debt?

To meet these general allegations, the only specific instance referred to is that of Mr. Barricklo, the complainant. His loss occurred in November, 1850. He says that they neglected and refused to pay him, and that he has commenced a suit against the company. But he does not state that they refused to pay him for *want of funds;* and it appears that the reason why they did not pay was not because they had not the funds, but because there was a dispute, and which the company deemed well founded, as to the justness of Mr. Barricklo's claim.

There is not, in the whole bill, another instance stated where the company have ever refused to meet their liabilities, and not an instance where they have neglected to meet all the demands against them during business hours.

Nor is there any thing in the proofs or affidavats to show that this company have ever in any case refused or neglected to pay just demands against them. The great effort which was made to show that it was for want of funds they hesitated for so long a time to pay the life risk which was placed in the hands of Mr. Halsted for collection, would seem strongly to indicate that whatever may be the actual condition of the company, they have, thus far, fulfilled their engagements in paying to the policy holders their amount of losses sustained by fire.

By every principle of law and equity, in absence of all proof to the contrary, they are entitled to the benefit of this conclusion, when it was of such importance to the success of the complainants to make out a default in this respect. Indeed, it is a matter of surprise that in an investigation of the charge of insolvency against the company which has been doing such extensive business, and where so much money has been paid out for losses, so little could be

found to make out any delinquency in meeting promptly their pecuniary engagements.

That they have stopped carrying on the business of insurance, is no evidence whatever of their insolvency; and this charge is in strange contrast with the ground stated in the next paragraph of the bill for asking the interference of the court, that the policy holders being liable to make up losses to the amount of their premium notes, the liability of the complainant, Joshua Rawnsley, as well as that of all the other policy holders, will continue to increase if the said company should continue to carry on their business of insuring. That they have stopped insuring and are husbanding their resources to meet their recent heavy losses, is a circumstance much more to the credit of the directors, than a cause of censure against them, and the safety of the public, as well as the interest of the stockholders demanded such a course. It is the very protection and relief which would be afforded by granting the prayer of this bill.

But let us examine other facts stated in the bill as the foundation for the interference of the court. Perhaps it will be most satisfactory to take them up in the order they are stated.

After setting out the charter and several of the by-laws, the bill alleges that the company established agencies in New York and Philadelphia; that by the laws of the State of New York it became necessary that they should furnish proof of the amount of capital, and of the manner in which the same was invested; that under pretence of complying with the laws of New York, they created what was called their guaranty capital.

There are several particulars alleged as to this guaranty capital, for the purpose of showing the improper manner in which the directors have acted in administering the affairs of the company.

Among others, the insufficiency of the securities taken to constitute this capital—the utter unavailability of the capital itself for the purposes for which it was created—that a large

part of this capital was withdrawn while the agents of the company continued to effect insurances upon the representation that the whole capital still existed—that the act of the directors in constituting this capital was illegal, and that they have misappropriated money in paying interest upon it.

There is no charge in the bill that any officer or agent of the company has been benefitted, directly or indirectly, by the creation, or the use of this capital, or that it was not created in good faith, and for the purpose of promoting the general interest of the stockholders. The complainants themselves make an exhibit among their proofs, by which it appears that the affairs of the company were investigated by a committee of the Legislature, and that in their report dated Feb. 6, 1850, they particularly mention this guaranty capital, and the causes which induced the directors to create it, and the terms upon which it was secured, to wit: the payment of six per cent. per annum, to those who furnished it. The report states: "The committee have carefully examined the bonds and securities, composing the guaranty capital, and find them to be absolute money bonds with collaterals; and while they have full confidence in the responsibility of many of the names attached to the bonds, they are not sufficiently acquainted with the value of the real estate and other securities found as collateral, to express from personal knowledge an opinion with regard to their value."

But the committee furnish the certificate of the then mayor of the city of Trenton, certifying that he had examined these securities, that they were good, and possessed an actual value of one hundred and fifty thousand dollars. After the use of this capital for two years or more, and its having been brought to the knowledge of the legislature, who had instituted an inquiry by committee, for the very object of ascertaining whether this company was conducting its business according to law, and the terms of its charter, and no disapprobation expressed by them with the creation, or use of this capital. I should be going too far to determine upon the facts and issue before me, that this guaranty capital was illegal, and that the individuals furnishing it had

incurred no pecuniary liability. There are too many policy holders, having a deep interest in this question, for me to decide upon their rights in this collateral and unsatisfactory manner. And I do not think it proper, that I should intimate an opinion which may in any way impair the rights of a large portion of the community which this question affects. It is not necessary that I should do so, in order to decide the question now at issue.

It appears that a large amount of money has been paid for interest on this capital. But it is not charged, that it was corruptly paid, or that any director, officer, or agent of the company, directly or indirectly, participated in any benefit derived from it. If any error has been committed in reference to the creation and use of this capital, it is not pretended by the bill, that it was any thing more than an error of judgment.

The bill then refers to the report of the committee of the Legislature in 1850, and to an advertisement made by the company in the State Gazette, on the 27th of January, 1851. But it appears by this report, that at that time the company was solvent, and in the advertisement referred to, the assets of the company are stated at upwards of two hundred thousand dollars. The very object of this advertisement was, to show the solvency and safety of the company as an insurance company. There is no allegation by the complainants, that these statements made by, and on behalf of the company, were not strictly true; and how they go to show the insolvency of the company then, or now, or what bearing they have on that question, was not stated in the argument, and I have been unable to conceive. If the bill had proceeded to allege that those statements were false, and made to impose on the public, and did not represent the true condition of the company at the time, or that since they were made, the large amount of funds then on hand, had been abstracted improperly, and squandered, there would have been some virtue in setting out these matters.

I have now referred to all the facts of the bill, except one, and that is the declarations made by the president, at

a meeting of the policy holders, in reference to the condition of the company.

As these declarations appear to me to be the only real foundation for this proceeding, and probably the cause of this suit being instituted, I will quote the language of the bill respecting them:—"That it appears by the statement of the president of the company, made at a public meeting of the members of the said company, and in the presence of several of the directors of the said company, that up to the spring of the year 1851, the company was in a prosperous condition—that they had a surplus over every thing—that a series of losses followed—that the news arrived of a loss of twenty thousand dollars—it was astounding, it was regarded as a death blow. The question then was, can we go on? could we take the money of any man, when we thought there were doubts about being able to pay his loss? As honest men we could not do so; and we resolved to take no more risks—we issued circulars to our agents to issue no more policies."

It is evident that in these declarations there is nothing to show the company insolvent. They had met with a heavy loss of twenty thousand dollars. There was no doubt expressed as to the ability of the company to meet the loss already incurred. The determination to take no more risks was because the funds of the company were so far exhausted as to render the insurance of persons insured insecure. Further losses might make the company insolvent. But the company had met all the losses already sustained, and the fact that their resources were such, that if any further losses occurred, the company would not be able to meet them, induced the directors to determine wisely, that they ought not, and would not take any more risks.

But the bill alleges further, "that the said president, at the said public meeting of the members of the said company, advised gentlemen to get insured elsewhere than in the said company, and to get their policies cancelled. And upon being inquired of whether he considered the policies in said company good, he replied no; and being asked

whether the whole amount of premium notes would pay the losses, the said president answered no. He further said, that the losses were forty-five thousand dollars, and the premium notes twenty thousand dollars, and that these losses all occurred in the last six months."

It is not pretended, and cannot be with any plausibility, that the test of the insolvency of this company is, whether they have funds or resources enough to meet all the *risks* they have *taken*, or indeed any considerable portion of them. The question is, have they paid, or are they able to pay, all legal demands made upon them for losses that have actually been sustained? There is no capital provided by the charter to which the insured is to look for a remuneration in the event of a loss, except that which is furnished by the insured themselves as a premium for their policies. The first insured, had nothing to look to, but the premium he had himself paid; and the very principles upon which the company is established, exclude the idea of a capital sufficient to pay the whole amount, for which insurances had been effected, if every risk should prove a loss.

It appears from the evidence furnished by the complainants, as to these allegations of the bill respecting the statements made by the president, that they were made at a public meeting of the policy holders—that the president then and there invited inquiry—that he answered fully and frankly all questions propounded. The bill does not allege that his statements were incorrect, disingenuous, or unsatisfactory. It does not pretend, that he said the company was insolvent, or that they had not funds amply sufficient to meet all their losses. I am unable to discover that he stated any fact which goes to show the company insolvent. His statement, that the losses were forty-five thousand dollars, and the premium notes twenty thousand dollars, only shows that the premium notes are not sufficient to pay the losses. That may well be, and yet the company have funds enough besides the premium notes to pay double the amount. If such were the fact, or there were any plausible grounds for suspicion, that the only fund or resources to meet the

losses, were the premium notes, why did not the bill so charge?

It appears from other parts of the bill, that the company, from time to time, had large sums of money invested, and there is no charge, nor intimation, that they have not now resources enough to meet their losses, independent of the premium notes. There is another fund provided by the charter, and to which no allusion is made in the bill, and that is the "one per cent. on the principal sum mentioned in each policy." It was urged in argument, that this fund amounted to nothing, for two reasons. First—Because of the expense of collecting it; and second—because a large number of the policies were effected upon misrepresentation, and payment cannot be enforced on that account.

As to the objection of the non-availability of the capital, it may be answered, that this mode of furnishing funds being provided by the wisdom of the legislature in the charter itself, it would hardly answer for this court to declare in advance, its inadequacy, from the mode of its existence. And as to its being void for fraud, there is not the slightest foundation for the charge from any thing alleged in the bill.

The president, in the affidavit which he puts in on behalf of the defendants, after some explanations of the real situation of the company, says, "the amount of the premium notes and one per cent. on the amount insured, and for which the insured are liable under their charter, makes an amount much more than sufficient to pay and satisfy all the just liabilities of the said company." If that is true, this court is not authorized to grant an injunction or appoint a receiver, and there is nothing in the bill, or in the evidence taken, to contradict this statement. There is not a charge of corruption or fraud against these directors, nor one from which fraud should be inferred. This company may be insolvent, and the directors may have acted with all the indiscretion and fraud with which they were charged in the argument, but I must decide this case as it is made by the pleadings, and I cannot give weight to allegations of coun-

sel, or to statements under oath, of matters which have no correspondence with the charges contained in the bill.

It was said in argument, that this affidavit of the president should be governed by the same rules as an answer, and that the allegations in the bill not responded to by the affidavit, should be taken as true. Admitting this is so, the affidavit does respond to every fact in the bill which bears upon the question in issue, to wit, the insolvency of the company; and if that affidavit is true, this company is not insolvent.

Among other things, it was insisted in argument, that the refusal of the company to produce their books, upon notice, before the master, and the refusal of the president and officers to be sworn when called on as witnesses, should be considered by the court as strong evidences of insolvency.

Without intimating any opinion as to the correctness of the advice of counsel by which the company and its officers were governed in these respects, I will only say, that in a case of doubt, these matters might be urged with force. But giving to them all the consideration to which they are entitled, without other facts to warrant it, they are insufficient, in my judgment, to authorize the interference of the court.

In conclusion, I would remark that if one half of the charges made in argument against the managers of this company, and as to its condition, were before me in a proper shape, I would not hesitate to take its management out of the hands of the directors.

If the directors have been guilty of the fraud and corruption, and the concerns of this company are in the hopeless condition represented by counsel, why was not such a case made by the bill? If this guaranty capital is all fictitious, and was concocted for private speculation—if certain officers and directors of the company have been receiving interest on worthless bonds and mortgages—if unnecessary and exorbitant sums have been paid for salaries of officers, and for agencies, and in other ways squandered —if insurances in and out of this State, to the amount of

several millions, have been effected upon gross, false misrepresentations—if the funds of the company have been illegally abstracted, and the guaranty capital and premium notes spirited away, why has not such a case been made and presented to this court by the complainants in their pleading? If such a state of things exists, it is no fault of the law, or of this court, that the remedy is not applied. But I cannot act upon my own suspicions, nor upon public rumor, or public excitement. It would be unwise and in violation of individual rights, for me to do so; and should it turn out that such suspicions and rumors and excitement were not well founded, I should have inflicted an injury which I could not repair.

There is one important consideration which would prevent me from interfering with this company by the appointment of receivers, except in a very plain case, and one of pressing necessity.

It is manifest that the policy holders who have sustained losses, must look for their remuneration to the assessment provided for by the charter—the premium notes—and the one per cent. on the policies of the insured. This must necessarily, from the extensive business transacted by the company, produce a large fund. From the nature of the contracts with the policy holders, can this assessment be made by any one except by the directors? Could it be legally made by receivers appointed by the court? At best these are doubtful questions; and the action of the court asked by this bill, may work the total destruction of this whole fund.

These directors are the trustees appointed by the stockholders and policy holders to protect their interests. Upon the application of a single policy holder, charging no breach of trust, or any unfaithfulness on the part of their directors, I could not justify myself in putting in jeopardy the fund to which the insured look for a remuneration of the losses they have already, or may hereafter, sustain.

I have examined this case with care, and commenced the investigation with feelings strongly predisposed to grant the prayer of the bill. It is my conviction, not

only that it is not a doubtful case, but that there is not the slightest ground afforded to justify me in declaring this company insolvent, and subjecting it to the provisions of the act to prevent frauds by incorporated companies.

Nothing that I have said can be construed into an approval by this court, as to the manner in which the affairs of this company have been conducted.

My opinion is founded, and my conclusion reached, upon the case made by the pleadings, and the proofs corresponding therewith.

The injunction is denied.

JOHN ENDICOTT v. ELI MATHIS et al.

Where an injunction had been allowed by a master, and the material matters in the affidavit inducing the making of the order, were contradicted by the records of this court: the Chancellor, on motion, dissolved the injunction.

Where an injunction has been obtained on a misrepresentation of facts, it does not alter the case whether that misrepresentation was through inadvertence, misinformation, or otherwise.

Where the Chancellor had dissolved an injunction to stay the proceedings of an action of ejectment on the ground that the equity of the bill was fully answered, and subsequently a bill similar in every substantial matter was filed, in which another assumed the position of the complainant in the first bill, for the mere purpose of obviating the difficulty which the proceeding in the other suit interposed to the aid of the court being again obtained, and it was apparent that the suit was got up by the former complainant, and that he was as much interested in it as if he were a party to the record; and no reason appearing upon the face of the papers for instituting another suit.

Held that "To countenace these proceedings would encourage litigation and the multiplication of suits. It would be to exercise the injunction powers of the court—to embarrass and retard, instead of promoting justice."

While a party is in contempt for disobedience to an injunction, he cannot properly have a hearing on a motion for its dissolution, but when the nature and extent of the punishment to be inflicted for such contempt, depend on the determination of the question whether the injunction shall be continued or not, the hearing may be allowed.

The court will not allow its process to be disregarded or evaded on mere technical grounds.

So where *E. M. and wife* were the lessors of the plaintiff in the action of ejectment to stay proceedings in which the order was granted, and in the writ of injunction served, the suit restrained is described as one in which *E. M. alone* is the lessor of the plaintiff, there being no other suit pending in which E. M. was the lessor of the plaintiff, and no allegation that there was any doubt as to the suit intended. It was held no sufficient reason to disregard the injunction.

This cause was heard before the Chancellor at February Term, 1852, on motion to dissolve the injunction which had been allowed by a master. The grounds relied upon in support of the motion sufficiently appear by the Chancellor's opinion.

Mr. *Browning* for the motion.

Mr. *W. Halsted* contra, cited Evans *v.* Van Hall, Clark's Ch. Rep. 22; John. *et al. v.* Pinny *et al.* 1 Paige Ch. Rep. 646; Rogers *v.* Pattison, 4 Paige Ch. Rep. 450; 1 Russel and Miln, 103; 1 Hoffman Ch. Prac. 450.

CHANCELLOR. The bill in this cause was filed on the 8th day of December last.

In aid of the relief sought, an injunction is prayed for to stay the proceedings of an action of ejectment brought by the said Eli Mathis against the said John Endicott in the Supreme Court. The ejectment is for lands in the county of Atlantic, and it was noticed for trial at the Atlantic Circuit on the 9th day of December last, the day after the filing of the bill. The application for the injunction was made to James Ewing, Esq., an injunction master, at the city of Trenton, and was allowed.

The motion now is to dissolve this injunction. The grounds relied upon in support of the motion are,

First: That the injunction was obtained by the misrepresentations made to the master. And the records of this court, in connection with the affidavit annexed to the bill, are relied upon in support of the allegation.

Second: That the answer of the defendant, Eli Mathis, fully meets the equity of the bill.

There were other reasons assigned and argued, but I deem it unnecessary to notice them in deciding the case.

Upon the threshold of this investigation, the complainant interposes an objection, which, he insists, should preclude the defendant from being heard upon his motion at this time.

The complainant's counsel reads an affidavit made by the counsel himself, dated the day of the hearing of this motion. It sets out that the injunction issued in this cause was served on the attorney of the plaintiff in the action of ejectment before the opening of the court the day on which the cause was noticed for trial; that notwithstanding such service, when the cause was called, the attorney, after stating to the court the fact of the service of the injunction, and reading

the same to the court, moved the cause, and proceeded with the trial.

It is clear from authority, and there seems great propriety in the rule, that a party in contempt is not entitled to a favor from the court, until he has made satisfaction for such coutempt. It is said in one of the cases cited on the argument, (Evans *v.* Van Hall Clark's Ch. Rep. 22,) that "it does not seem quite clear at what particular point of the proceeding a party shall be deemed in contempt." But as this is a matter so entirely in the discretion of the court—where the court is simply vindicating its own dignity—it would seem, that each case as it arises, must depend very much upon its own peculiar circumstances.

While a party is in contempt for disobedience to an injunction, he cannot properly have a hearing on a motion for its dissolution; but where the nature and extent of the punishment to be inflicted for such contempt depend on the determination of the question, whether the injunction shall be continued or not, the hearing may be allowed.

Williamson *v.* Caman, 1 Gill and Johns. R., 184.

In the case before us, did the affidavit stand alone in reference to this point, and the facts not denied or explained, the court ought not to permit a disregard of its process, apparently so flagrant, and allow a party to proceed with a motion, which if successful, will secure to him the fruits of his disobedience to the mandates of the Court. If such was the question now propounded, I should, without hestitation, answer it in the negative.

But the attorney of the plaintiff in the ejectment suit, and who appears as solicitor and counsel on this motion, has placed on file and read his own affidavit in reply to that which charges the breach of this injunction. He admits the cause was tried, but a variety of circumstances are set out as an excuse for the course pursued. Before moving the cause, he made a statement to the justice of the Supreme Court who held the circuit, and appealed to him whether under all the circumstances it could be construed into disrespect

towards the court for him to proceed with the trial of the cause. The justice declined giving any advice, but at the same time, did not in any way discourage his doing so. He also consulted a counsellor at law, then present, who gave it as his opinion that his proceeding in this trial would be no violation of the injunction. The attorney further states in his affidavit, that "had he supposed the trial of the said cause could be considered as a violation of said injunction, he would most cheerfully have refrained from doing so, and so stated to the court upon moving said trial."

Upon the case as presented by the affidavits, I would, if there were no peculiar circumstances which induce me to think that justice to the defendant demands a different course, require him before considering the motion for dissolution, to place the opposite party, as near as might be, in the same position at law as the injunction found him at the circuit.

But it may be proper for me here to notice one reason assigned as inducing the attorney to disregard the injunction, lest it might be supposed as influencing me in this decision, and the position taken be regarded as having received the sanction of this court.

In the ejectment suit, Eli Mathis and wife are the lessors of the plaintiff. In the writ of injunction served, the suit restrained is described as one in which Eli Mathis alone is the lessor of the plaintiff. It is argued by counsel, that on account of this discrepancy, it was no contempt to disregard the injunction. Had there been another action of ejectment depending, in which Eli Mathis was the lessor of the plaintiff, or if by this discrepancy there was any thing which could lead to the supposition that this was not the action intended by the writ to be restrained, and such was the honest belief of the party, the court could not consider the proceeding with the trial a contempt of its process and authority. But here it is not alleged that there was any doubt as to the suit upon which the writ was intended to operate. If the court should allow its process to be disre-

garded, or evaded, on mere technical grounds, its powers would be enfeebled, and its usefulness impaired. With the view of maintaining the authority of the court and giving vigor to its jurisdiction, courts of chancery have decided that a party is in contempt who knows an injunction has issued, or is about to issue against him, and yet commits the act prohibited before the injunction can be formally issued and served upon him. (Hull v. Thomas, Head and another, 3 Edward's Ch. Rep., 236,) and cases there cited.

From the facts and circumstances already alluded to, in connection with the conduct of the complainant and Joseph E. West in procuring this injunction, and to which I will presently refer, I do not feel called upon to vindicate the dignity of this court, by refusing the defendant an opportunity of being heard on his motion.

Let us now examine the ground upon which the defendant rests his application for dissolving the injunction.

Was the order procured upon misrepresentations made by the complainant, or his agent?

The ejectment was commenced in February term, 1843, of the Supreme Court. The trial was postponed, from time to time, on account of negotiations for settlement between the parties, until it was noticed at the term of September, 1850, of the Atlantic circuit. On the 9th day of September, 1850, Joseph E. West exhibited his bill of complaint in this court, and obtained an injunction against Eli Mathis, this defendant, restraining further proceedings in the action of ejectment. A special affidavit accompanied the ordinary affidavit to the bill, as required by the rule, assigning the reasons why the injunction had not been applied for until within twenty days of the day of trial. The usual order was made requiring the complainant to pay the costs incident to bringing the suit at law to trial. The injunction was served and it was obeyed, although the costs were not paid as ordered, and have not been paid up to this time.

The equity of West's bill may be stated in a few words. It is contained in the following allegations:—That West

had entered into a written agreement with Eli Mathis and others, for the purchase of the land in question—that he had paid the consideration money—that Eli Mathis had not executed a deed as stipulated by the said agreement—that after the agreement, West entered into the possession, and then sold and conveyed the land by warranty deed to John Endicott, the present complainant, and that the said Mathis had commenced the suit in ejectment, to turn the said Endicott out of the possession of these lands. The prayer is for injunction, and that Eli Mathis be decreed to perform his said contract, or to pay back the consideration money.

Eli Mathis promptly answered this bill of West. The bill was filed on the 9th of September, 1850, and the answer on the 18th of the same month.

A motion to dissolve was argued before Chancellor Halsted. On the 6th day of December, 1850, the Chancellor made an order dissolving the injunction, upon the ground that the equity of the bill was answered.

The ejectment was then noticed for trial, as before stated, in December term last of the Atlantic Circuit. And now this bill is filed, and an injunction prayed in the name of the defendant in the ejectment suit, John Endicott. It is the same bill, in every substantial matter, as that exhibited by Joseph E. West. The greater part of it is a copy, word for word, from that bill. It is impossible for one not to see, unless wilfully blind, that Endicott assumed the position of West, as complainant, for the mere purpose of obviating the difficulty which the proceedings in the other suit interposed to the aid of the court being again obtained on the application of West. The affidavit annexed to this last bill is in the hand writing of Joseph E. West. The special affidavit accompanying the bill, and which I suppose was required by the master, is West's own affidavit, sworn to at Trenton, at the time the order was made. The papers all show that this suit was got up by West—that he is the active man in its prosecution, and is as much interested in it as if he was the party on the record.

But how was it, that the master ordered this injunction, in the face of the former proceedings? In the special affidavit referred to, West, after giving an excuse why the costs required in the order for the first injunction were not paid, swears that he understood that injunction was dissolved, on the ground of the non-payment of these costs. When he made this affidavit, the order of the Chancellor dissolving the injunction, on the ground that the equity of the bill was fully answered, was on file in the office, not three hundred yards distant, and to which he ought to have resorted for certainty in a matter of so much importance.

But it was insisted upon the argument, that the allegation of Joseph E. West in his affidavit—"that the injunction was dissolved, on the ground of the non-payment of costs" was true, and that the Chancellor did not dissolve the injunction for the reason of the equity of the bill being denied by the answer.

But there is the order signed by the Chancellor, bearing date the 26th day of December, 1850, and filed two days afterwards. It sets out "that the cause was regularly argued upon notice to dissolve the injunction upon the bill of the complainant, and the answer of Eli Mathis, one of the defendants, in the presence of William Halsted, solicitor and counsel of the complainant, and Abraham Browning, solicitor and counsel of the said defendant, Eli Mathis, and the Chancellor having duly considered the same, and being of opinion that the equity of the said bill is fully answered, and that the said injunction ought to be dissolved. It is therefore, &c." This order cannot be disregarded, and treated as a nullity, upon the mere affidavit of a party interested, that he understood the injunction was dissolved for other causes than those stated in the order of the Chancellor. It is hardly worth while to stop for the purpose of criticising this affidavit. And yet it may be observed, that while it states the affiant had understood the injunction had been dissolved upon the ground set forth in the affidavit, he neither alleges, that he believes this information correct,

nor that he understood the non-payment of costs was the only ground of the dissolution.

But suppose the allegation true. Is there any thing contained in the affidavit to show, that even if such were the case, the complainant in that suit was entitled to have the injunction revived? or the propriety of using the name of the present complainant, and by a new suit, accomplish the same end? The costs at law have not to this day been paid, nor have the costs of the dissolution of the injunction.

Joseph E. West states further, in his affidavit, that he supposed the ejectment would not again be moved until the matter was settled in chancery. He was the complainant. The defendant's answer was filed on the 18th of December 1850, and from that period to the filing of this bill, the 8th December, 1851, nearly a year, he had not taken a step to advance his cause. On what was his supposition founded?

This injunction was allowed upon Joseph E. West's affidavit. The material matters in it inducing the making of the order are contradicted by the records of this court. This injunction was obtained on a misrepresentation of facts, and it does not alter the case whether that misrepresentation was through inadvertence, misinformation, or otherwise. I do not think the master would have made the order with all the facts before him.

But, if it was true, that the first injunction was dissolved on the ground stated in the affidavit, to wit: the non-payment of the costs, even then I can see no occasion for this last bill. This present suit was not instituted because of the unwillingness or inability of Joseph E. West to afford Endicott all the protection he was entitled to, in the suit then already depending in West's own name. There was no necessity to change the complainant in the suit. Endicott sets up no equity, and is entitled to no relief, which could not as well have been obtained in the first suit, as in this one. There is no reason assigned why the decision of the court should be disregarded, except the one referred to as stated in West's affidavit. If John Endicott was entitled to an injunction upon his bill, as the case is now presented

to the court, Joseph E. West was entitled to an injunction on a proper petition in his suit then depending. A case might have arisen to have rendered it necessary for Endicott to come into this court in his own name. But no such case is now made. No reason appears upon the face of the papers, nor was any suggested at the argument, for instituting another suit.

To countenance these proceedings would encourage litigation, and the multiplication of suits. It would be to exercise the injunction powers of the court to embarrass and retard, instead of promoting justice.

I think this injunction should be dissolved, on the ground that it was procured under circumstances, and in a manner, which ought not to receive the sanction of this court.

The same answer has been filed to this, as to the first bill, with some immaterial variations, to accommodate it to the substitution of names, and to some other matters which do not touch the equity of the case.

I think the equity of the bill is answered.

Let the injunction be dissolved with costs.

JOSEPH E. WEST Ex. of GEORGE WEST, dec'd, v. THOMAS PAGE et al.

The court will not interfere to stay waste in cutting timber, where the complainant by his own showing has promoted suits against some of the defendants to the bill for cutting timber on the land where the court are asked to stay waste, and has never been able to succeed in obtaining the verdict of a jury or a judgment of the court, and has himself been prosecuted by some of the defendants for a trespass on the lands, and a verdict of $2,000 rendered against him, the complainant not alleging that any of the defendants are insolvent or unable to respond to any amount of damages he may have sustained.

This cause was heard on motion to dissolve the injunction on bill and answer.

A. Browning for the motion.

Wm. Halsted, Jr., and *Wm. Halsted* contra.

THE CHANCELLOR. The complainant, as the executor of George West, deceased, claims title to twenty tracts of timber land in the county of Burlington, containing, as is estimated, upwards of four hundred and forty-six acres.

Without expressing any opinion as to whether the question should be considered as settled in this State—that the court will not interfere to stay waste in cutting wood and timber, where the cutting is extensive, the defendants unable to respond in damages, and the property valuable mainly on account of the timber; I do not think the complainant makes by his bill a case in which the court ought to interfere. By his own showing, he has prosecuted several suits against some of these defendants, for cuttiug timber on this land, and has never been able to succeed in obtaining the verdict of a jury or a judgment of the court. He has himself been prosecuted by some of these defendants for a trespass on the lands, and a verdict of $2,000 was rendered against him.

He does not allege that any of these defendants are insol-

vent, or unable to respond to any amount of damages he may have sustained.

The answer sets out very fully the title and the history of the different tracts. To some of the surveys the defendants set up no claim of title, and deny all knowledge of any cutting upon them. To others they claim title and set out particularly their chain-title.

There is nothing in the case calling for the interference of the court, and the injunction must be dissolved with costs.

ANTHONY R. RAINIER *et al. v.* WILLIAM C. HOWELL *et al.*, trustees.

Where the whole equity of a bill rested upon the fact that the defendants were the trustees of a church, and as such were violating their trust; and there was no distinct allegation in the bill that the defendants *were such trustees*, or that there *existed* any such corporate body, nor any statement *of the manner* in which the trust they were charged with violating was committed to them.

Held that the informalities and omissions in the bill were of such a character as could not be cured or waived by the pleadings or by consent.

The Court of Chancery will go a great way in protecting trust property, even to examining into the creeds and doctrines of religious societies, if the nature of the trust depend upon them.

But it must appear in the bill that the trustees are perverting the property entrusted to them to uses and purposes inconsistent with that trust, and that the matters complained of were not such as had been committed to their discretion; and for this purpose the court must be able to ascertain the limits of their authority over the property under their charge.

This case was argued before the Chancellor, February term, 1852. The defendants having answered, now move to dissolve the injunction which had been allowed by a master.

Mercer Beasley for the motion.

E. W. Scudder contra.

THE CHANCELLOR. The complainants are members of The Methodist Episcopal Church of the City of Trenton," d have exhibited this bill on behalf of themselves and hers, members of the said church, against the defendants, o are the trustees of the same.

The complaint is, that the defendants, as trustees, have re- ed to pew the church edifice in which the congregation ship, and to sell and rent the pews, or both, and are pre- ng and intend to carry the resolution into effect, and that

they are painting, papering, and repairing the said edifice at an expense beyond the means of the congregation.

On application to the master, an order was made for an injunction, which was issued, restraining the said defendants "from employing or permitting any person or persons to pew the said church, and from selling or renting, or both selling and renting, the pews of the said church, or sittings therein, and from imposing the expenses of painting, papering, and repairing the said church, beyond the present means of the church, and in such way as to embarrass and increase the present indebtedness."

The defendants have answered the bill, and now move to dissolve the injunction.

I am much embarrassed in deciding this motion, on account of informalities and omissions in the bill. They were not noticed on the argument, and as no advantage is taken of them by the answer, I should have been willing to overlook them, were they of a character to be cured or waived by the pleadings or by consent.

The whole equity of this bill rests upon the fact, that the defendants are the trustees of "The Methodist Episcopal Church of the City of Trenton," and, that as such, are violating their trust. And yet there are no distinct allegations in the bill, that the defendants are such trustees, or that there exists any such corporate body as "The Methodist Episcopal Church of the City of Trenton," nor any statement of the manner in which the trust they are charged with violating was committed to them. And whether these trustees are incorporated under the statute to incorporate the trustees of religious societies, or by a special law, or whether they are incorporated at all, are all left to conjecture.

It is true, taking the bill and answer together, we may draw inferences which probably are correct, but it is very unsatisfactory to be driven to this necessity, and will not answer where the material and substantial matters of the bill are involved, and in a case exciting so much interest, and so important as the one before the court.

Again. The very essence of the complainants' case consists in this, that "The Methodist Episcopal Church of the

City of Trenton" is connected, and is in ecclesiastical union with the Methodist Episcopal Church of the United States, and governed by its rules, discipline, and usages. This is the foundation upon which the complainants build; and yet, what that ecclesiastical body is—of whom composed—what called—how organized—or how the Trenton church, as a branch, is connected with it, we are not informed.

I do not mention these matters from a disposition to make any unnecessary criticism upon the bill. They are real embarrassments in the complainants way, and together with others to which I shall refer, render it impossible for me to decide upon these pleadings, the important question which was intended to have been submitted for the decision of the court.

The Methodist church of which the defendants are the trustees, was organized in the city of Trenton as early as the year 1772. It was established, and has been since conducted, as the answer admits, according to the regulations, discipline, and usages of the Methodist Episcopal Church of the United States.

In the year 1837, the then church edifice of this society being too small to accommodate the increased numbers of the congregation, the present building was erected. The lot upon which it stands was conveyed by deed to "The Trustees of the Methodist Episcopal Church of the City of Trenton," their successors and assigns. The subscription book in which the names of subscribers were recorded, was headed as follows: "Whereas the house in which the Methodist Episcopal Church in Trenton has for years past worshiped is too small, and otherwise inconvenient; and whereas, the society, at a meeting held on the 23d instant, unanimously resolved to build a new one suited in size and structure to accommodate the congregation, we, whose names are undersigned, do promise to pay to the trustees of the Methodist Episcopal Church of the City of Trenton, the sums by us respectively subscribed in four quarterly payments." The bill alleges "that the subscriptions were made with the express understanding that the said church was to be erected, and in all

respects managed and conducted according to the known and established regulations, discipline, and usages of the Methodist Episcopal Church." This the answer admits.

The bill further alleges that it was the understanding of the subscribers, that the church was to be, and continue, a free seated church, and no pews were to be sold or rented. It is insisted the said trustees hold the property subject to this trust, and that to sell, or to rent the pews is a violation of it. This charge, and the inference, are denied by the answer.

The subscription was in writing. No such condition is annexed to it, as that the church was to be and continue a free-seated church, and no pews sold or rented. The subscriptions were made to build a Methodist Episcopal Church. They were payable to "the trustees of the Methodist Episcopal Church of the City of Trenton," to be devoted to that object.

No one or more of the subscribers can come forward now, and ask the interference of the court, on the ground that they subscribed upon some understanding which the trustees are about to violate. Various representations might have been made, wholly unauthorized, to different individuals, to induce them to subscribe. But the violation of every promise made to the subscribers, would not justify an interference with this religious society in the management or disposition of its property.

Nor has the court a right to interfere, upon the grounds alleged in the bill—that a majority of the members of the congregation are opposed to the proposed action of the trustees—or that the trustees are making additions to or alterations in the property, which are extravagant, and at a cost beyond the means of the congregation.

A court of chancery will go a great ways in protecting trust property. There is nothing which it undertakes with greater reluctance than that of examining into the creeds and doctrines of religious societies, and yet it will not shrink from the discharge of this duty, however delicate or embarrassing, if the nature of the trust depends upon them.

In this case, although the trust is not expressed in the deed to the trustees, yet the corporate name in which the conveyance is made to them, and by which they hold the property, and the contemporaneous acts of the corporators sufficiently, and clearly indicate, the nature of the trust. Miller *v.* Gable, 2 Denio's Rep. 548. But the defendants admit the trust, and there is no difficulty as to this part of the case.

Are the defendants violating that trust? They are charged with so doing, in that they have resolved to pew the church edifice, and to sell or rent the pews. As I have already suggested, because a majority of the members of the congregation are opposed to the measure—or because of its unnecessary extravagance—or because it will involve the congregation in a debt which it will be embarrassing for them to pay —any or all of these matters, and upon which the bill lays so much stress, are no violation of any trust which this court can protect.

These defendants may betray the confidence which has been reposed in them—they may exercise their authority so as to disturb the harmony, and destroy the usefulness of the religious body they represent—they may disregard the remonstrances of their brethren, and spiritual teachers, and yet such actions be beyond the control of the court. For such moral delinquencies they must answer before another tribunal. I do not mean to insinuate that these defendants are guilty of any misconduct. The charges were made very boldly on the argument, and promptly denied. I refer to them, simply to define the jurisdiction of the court, and to deny its authority to interfere on ony such grounds.

The question is, are the defendants perverting the property entrusted to them, to uses and purposes inconsistent with and subversive of that trust?

It is evident the case intended to be made by the bill is this: that the converting of a free-seated church, into one in which the pews are rented, or sold, is subversive of the discipline and usages, and in direct violation of the prescribed rules of some ecclesiastical body in that church, which, according to the church government of the Methodist Episco-

pal Church, controls the trustees, leaving with them no discretion in the matter. Such was the question discussed upon the argument. But it is not presented by the pleadings.

The power to regulate the sittings in the church must be lodged some where. *Prima facie*, this power is with the trustees, and unless some prescribed rules are shown depriving them of its exercise, it is committed to the trustees.

The bill alleges, that the trustees do not possess the power. But why? Who does possess it? What are the rules, and by whom prescribed, which control their action? No answers to these questions are to be found in the bill; and yet it is manifest, unless the court is informed as to these particulars, it cannot interfere with the trustees in the exercise of the power. How can the court decide that the trustees are violating their trust, unless it can ascertain the limits of their authority over the property in their charge?

The bill does indeed allege, that the trustees are acting "in direct violation of the discipline and usages of the Methodist Episcopal Church." The answer denies this, and affirms, that the regulations of the pews, and the appropriation of them as free-sittings, or otherwise, is a matter in no wise affected, or controlled, by the discipline, usages, or prescribed rules, of any ecclesiastical authority in the church; but is submitted entirely to the discretion of the trustees.

But in violation of the discipline and usages of what church? Is "the Methodist Episcopal Church of the City of Trenton," or "the Methodist Episcopal Church of the United States" referred to?

The facts are, that there is an association of ministers, or preachers of the gospel, called and known by the name of "The Methodist Episcopal Church in the United States"—that the government of the said church is vested in one delegated General Conference, a limited number of Annual Conferences, and an indefinite number of Quarterly Conferences. The General Conference is the legislative council for the whole church, and the several societies and churches, of which the Trenton Church is one, are united as parts of one common church, and are subject to the government, and

are regulated and controlled by the laws of the General Conference. The power to prescribe, or change the government and discipline of the Methodist Episcopal Church is vested in the General Conference, and the several organizations of the church are regulated and governed by the rules it prescribes.

It follows then, that these trustees are subject to this church government; and if the General Conference have prescribed any rules or regulations touching the appropriation of the pews, the trustees must conform to them, and act within the limits prescribed. Whether this matter is left to the discretion of the trustees or not, must depend upon the action of the General Conference in the premises. There is no other ecclesiastical body that controls the trustees. The trust reposed in them, is to manage the temporalities of the church committed to their superintendence, in a manner conformable to the rules, discipline, and usages of "the Methodist Episcopal Church of the United States."

But, although these are matters which may be ascertained by inquiry, no facts can avail the complainants, unless they are incorporated in their case.

All information must be derived from the bill and answer. The court must decide on the case as the complainants make it in their pleading.

Looking at the bill alone, it is very doubtful whether the weight of evidence, derived from the facts and circumstances therein stated, is not that the matter complained of is one of discretion committed to the defendants.

In support of the allegation, that the actings and doings of the defendants are in violation of their trust, it is stated, that shortly after it was made known that the trustees intended to "*pew*" the church, the members of the church held a meeting, at which they remonstrated against the proposed measure. And yet the bill does not allege they made any objection, on the ground that any rules, discipline, or usages of the church would be thereby violated, but on the contrary, shows that they viewed it simply as a matter of expediency, and passed the following resolution:—"That in the

opinion of this meeting, there is no necessity for pewing the church, on account of the difficulty in collecting funds to pay the just debts of our church, believing, as we do fully, that the membership has always been, and still are willing, to pay those expenses, if the proper application had been made to them for that purpose."

And subsequently to this meeting of the congregation, at a meeting of the Quarterly Conference, composed of all the travelling and local preachers, exhorters, stewards, and the presiding elder, to whom the board of trustees are responsible, as the bill alleges, and to whom they are required to present a report of their acts during the year, the subject of this controversy was taken under consideration and advisement. The following preamble and resolutions were passed: "Whereas, the trustees have announced through the pulpit, that they have appointed a committee to 'pew' this church immediately; and whereas, it is the opinion of this Quarterly Conference, that there is no necessity for such measure, and that it would be very prejudicial to the interest of the church, therefore, it is resolved, First, That this Quarterly Meeting Conference is opposed to this measure, and respectfully requests the trustees to reconsider their resolution, and not proceed with the work.

"Second, Resolved, That a copy of this preamble and resolutions be furnished to the board of trustees at their next meeting by the recording steward."

How is it, that a body, composed as this, of men familiar with their church government, its regulations, discipline and usages, after having this subject under deliberation, and coming to the determination to express in a formal manner, and in writing, their opposition to it, should place their objection on the ground of expediency merely, and without intimating that they considered it a violation of the rules, discipline, or usages of their church? They may have had good reasons for confining the expression of their opinion simply to the expediency of the matter.

I only refer to the circumstance, in connection with others I have mentioned, in order to point out the error into which

the complainants seem to have fallen, in supposing that this court could interfere with the action of these defendants, according to the judgment of the individual who presides here of the expediency of the proposed measure.

Whether these defendants, as trustees, have any right to "pew" the church edifice, and to sell, or rent the pews, I cannot decide upon the pleadings before me. If there are rules prescribed by the General Conference which forbid it, and the Trenton Church is in community with the General Conference, it would clearly be a breach of trust, calling for the action of this court, if the defendants attempted to make a disposition of the property confided to their care, in violation of those rules, and in a manner subversive of the discipline of the church.

Sincerely hoping that the unfortunate differences existing between the parties may be amicably arranged, and no further appeal to this court be necessary, I must order the injunction dissolved.

CHARLES STOKES, EX. *v.* REBECCA TILLY.

The intention of the testator is the law of wills, and when that intention can be ascertained, if not in violation of the rules of law, it will prevail over technical rules, and words in their technical or even ordinary meaning. The word "children" has a technical meaning in legal instruments. It is a word of *purchase*, and yet if it appears to have been the intention to use it in a different sense, as a word of *limitation*, it will be so construed, in order to effectuate that intention.

A residuary clause in a will was in the following words:—"I bequeath all the rest, residue and remainder of my estate, real and personal estate wheresoever, after the above legacies and money are taken out, then the remainder to be equally (divided) between the child or children of my nephew Acquila S. Ridgway and my sister Rebecca Tilly, each one to have an equal share thereof, and his children, or if but one child he should leave, to have its or their share with my sister, with the interest arising on each one's share paid them when and as they arrive at lawful age, whether then their father is deceased or living, *and for all my nieces and nephew Wallace Lippincott, the children of my deceased nephew Stacy Lippincott, to take their equal share therein with my sister Rebecca and the children of Acquila S. Ridgway*."

Held—that the children of Stacy Lippincott deceased, take *per capita*.

This case was argued at February term, 1852.

The only question involved was, whether the children of Stacy Lippincott took "*per capita*," *under the residuary clause* of Hope Haines' will.

The phraseology upon which the question of construction depended, is set out in full in the opinion of the Chancellor.

Peter D. Vroom for the complainant.

William L. Dayton for two of the defendants.

A. Browning for other defendants.

THE CHANCELLOR. The question in controversy arises upon the residuary clause in the will of Hope Haines, deceased, which is in the following words:—

"I bequeath all the rest, residue and remainder of my estate, real and personal estate wheresoever, after the above legacys and money are taken out, then the remainder to be equally between the child or children of my nephew, Acquila S. Ridgway and my sister Rebecca Lilly, each one to have an equal share thereof, and his children, or if but one child he should leave, to have its or their share with my sister, with the interest arising on each one's share paid them when and as they arrive at lawful age, wether their *their* father is deceased or living, *and for all my neices and nephew, Wallace Lippincott, the children of my deceased nephew, Stacy Lippincott, to take their equal share therein with my sister Rebecca, and the children of Aquila S. Ridgway.*"

The residuary estate amounts to the sum of $8,056 81¼.

Charles Stokes, the surviving executor of this will, exhibits his bill for the purpose of obtaining a judicial construction of this clause, to direct the proper distribution of the residuary estate.

The testatrix left, at her decease, a sister Rebecca Tilly, an infant child of her nephew Acquila S. Ridgway, Mary L. Haines, a widow, and Sarah Ann Pancoast, wife of Israel Pancoast, daughters of Wallace Lippincott, deceased, her nieces; Wallace Lippincott, her nephew, and son of Wallace Lippincott, deceased; Sarah Stokes, wife of Benjamin R. Stokes, Hope Deacon, wife of William H. Deacon, daughters of her sister Rebecca Tilly; Sarah Ann Roberts, wife of Isaac Roberts, Nathaniel Lippincott and Hope Lippincott, which Sarah Ann, Nathaniel and Hope, are children of Stacy Lippincott, the deceased nephew of the testatrix.

Sarah Ann Roberts, the daughter of the testatrix's deceased nephew, Stacy Lippincott, and her husband, Isaac Roberts, by their joint and several answer insist, that under the residuary clause of this will, the children of Stacy Lippincott, deceased, take "*per capita.*" If this is so, Sarah Ann Roberts is entitled to the one-tenth of the residuary estate.

Wallace Lippincott, Mary L. Haines, Israel Pancoast, and Sarah Ann, his wife, by their joint and several answer, in-

sist, that the children of Stacy Lippincott, deceased, take "*per stirpes.*" If this latter construction is the correct one, then the said Wallace, Mary, and Sarah Ann Pancoast, take each one-eighth of the residuary estate; and Sarah Ann Roberts, who, with her sister Hope Lippincott, and her brother Nathaniel Lippincott, represent their father, Stacy Lippincott, deceased, takes, instead of one-tenth, as she insists, only one-twenty-fourth part.

What was the intention of the testatrix? Did she intend the children of her deceased nephew, Stacy Lippincott, to take each one equal share with her nieces and nephew, or did she intend they should take "*per stirpes*," as the representatives of their deceased parent?

"The intention of the testator is the law of wills," and when that intention can be ascertained, if not in violation of the rules of law, it will prevail over technical rules, and words, in their technical, or even ordinary meaning. The word "children," and which is the word used in the clause of the will we are considering, has a technical meaning in legal instruments. It is a word of purchase, and yet, if it appears to have been the intention of the testatrix to use it in a different sense, as a word of limitation, it will be so construed, in order to effectuate that intention.

Upon reading this residuary clause, the first impression, I think, made upon the mind is, that the testatrix intended an equal division "*per capita*" among all the objects of her bounty therein referred to. A critical examination confirms the correctness of the impression.

Let us examine its language.

"I bequeath all the rest, residue, and remainder of my estate, real and personal estate wheresoever, after the above legacys and moneys are taken out, then the remainder to be equally between the child or children of my nephew, Acquila S. Ridgway, and my sister, Rebecca Tilly, each one to have an equal share thereof, and his children, or if but one child he should leave, to have its or *their* equal share with my sister."

There can be no doubt, but that the children of Acquila

S. Ridgway take "*per capita*." Rebecca Tilly, the sister of the testatrix, was to have one share, but the child or children of Acquila S. Ridgway and Rebecca Tilly were "each one to have an equal share thereof."

Then comes the provision in question, "and for all my nieces and nephew, Wallace Lippincott, the children of my deceased nephew, Stacy Lippincott, to take their equal share therein with my sister Rebecca, and the children of Acquila S. Ridgway."

But the children of Acquila S. Ridgway were "each one to have an equal share thereof." If, then, the children of Stacy Lippincott are to have an equal share with the children of Acquila S. Ridgway, then they are "each one to have an equal share thereof."

The testatrix speaks of the "children" of Stacy Lippincott, and the "children" of Acquilla S. Ridgway. Did she mean a different interpretation to be put upon the same word repeated in the same sentence and within three lines? When she speaks of the "children" of Stacy Lippincott, does she mean it a word of limitation? and when she speaks of the "children" of Acquila S. Ridgway, as a word of designation?

We have seen, she has put her own interpretation on the word "children" as connected with Acquila S. Ridgway, and as a "*descriptio personarum*," and that each child of Acquila S. Ridgway was to have an equal share with Rebecca Tilly.

But again. The "children" of Stacy Lippincott are to have an equal share with Rebecca Tilly. But the "children" of Acquila S. Ridgway are "each one of them" to have an equal share with Rebecca Tilly. So, then, must the children of Stacy Lippincott, "each one of them," have an equal share with Rebecca Tilly, or the children of Stacy Lippincott cannot have an equal share with the children of Acquila S. Ridgway.

Here are three children of Stacy Lippincott, deceased. If at the death of the testatrix, there had been three children of Acquila S. Ridgway living, they would have taken

"*per capita*" and have been entitled to three shares of this residuary estate. The three children of Stacy Lippincott take a like interest.

It was argued, that this construction gives to those related in the second degree to the testatrix, only equal shares with those who are one degree more remote—that if the construction of the will be obscure and doubtful, the rule is to resolve the doubt in favor of that construction, which best corresponds with our natural affections, and with the law of distribution.

It is apparent, the testatrix had no allusion to the statute of distribution. Nor did she intend to conform to our general notions of an equitable division of property among her kindred. She makes an arbitrary disposal of all her estate, both in this and in other parts of her will.

In the clause in question, she gives to her sister, Rebecca Tilly, one share, and she gives likewise to Rebecca's two daughters, each a share equal to her mother. Rebecca and her family get three shares, while her brother Wallace Lippincott's family get four shares, upon the most unfavorable construction of the will. Another branch of the family, represented by Acquila S. Ridgway, the son of a deceased sister, receives one share only, there being but one child of his living at the death of the testatrix. This inequality is not reduced by other parts of the will.

Other clauses of the will, and the seventh particularly, were referred to by the counsel on both sides, in the argument, as a key to the intention of the testatrix in reference to this particular clause. There is room to draw arguments in favor of both views presented.

It is plain, the testatrix did not use the word "children" with any reference to its technical legal signification. Wherever she uses it, it is with explanations, or with the addition of some significant word to indicate her own meaning of the term.

In the seventh, in bequeathing the principal sum of four thousand dollars to the children of her nieces Sarah Stokes and Hope Tilly, after securing to their parents, the interest

of the same during their lives, she gives the principal to the children "*per stirpes.*" It is evident from her language, that she was laboring to keep this idea prominent, and to have no misapprehension about her intention. And yet, in this same clause, when she comes to dispose of the two thousand dollars, upon the happening of certain contingencies, it is in this language—"to go to my neices, Mary Haines children, and Sarah Ann Pancoast children, and the children of my deceased nephew Stacy Lippincott, equally divided and paid between them *all.*" The single word *all* here being added to signify her intention.

In the fifth clause of the will, in disposing of other two thousand dollars, upon the contingency of the death of her nephew, Wallace Lippincott, it is in these words—"at his death, equally between his sisters, Mary Haines and Sarah Ann Pancoast, and the children of his deceased brother, Stacy Lippincott," which is very nearly the identical phraseology of the will in the case of Butler *v.* Strattan, in 3 Brown's Rep. 367, and where it was decided the devise was "*per capita.*" And yet the testatrix expressly declares this was not *her* meaning, for she adds, "that is, for his children to take the one-third of said two thousand dollars equally between them, being the share thereof their father would been entitled to if living."

I have examined all the authorities referred to in the argument, but it is manifest they can be of very little assistance upon a construction depending, as this does, so much upon mere phraseology, and where there is no room for the application of technical rules or definitions.

The counsel who contended for the construction "*per stirpes,*" relied upon the case of Roome *et al. v.* Counter, (1 Hal. 111,) as an authority of our own tribunals, which should govern the court in the decision of this case. He contends that it condemns the case of Blackler *v.* Webb *et al.*, (2 P. Wms. 383,) and therefore the court should not consider the latter case as authority. In the case in P. Wms. the will was a very different one in phraseology and technical terms from that decided upon in Roome *et al. v.* Counter,

and so it is remarked by the court in their opinion in the latter case. There is, it appears to me, no resemblance between the case in 1 Hal. and the present one. The Chief Justice, certainly, did not mean to say that there is no different meaning attached to the word "heirs" and the word "children," or that the word "children," in its technical signification, is not a word of purchase. And if he did not so decide, I cannot see in the case any thing which I ought to consider as authority to govern me in this decision.

My opinion is, that the children of Stacy Lippincott, deceased, take, under the residuary clause of this will, "*per capita.*"

Let a decree be made accordingly.

JOHN S. GREENIN v. PETER HOEY and JAMES MOORE.

In making an exception to the general rule that the court will dissolve an injunction when the equity of the bill has been fully answered, the court will be governed in some degree by the consequences to follow upon the dissolution, and by the conduct of the complainant in prosecuting his suit.

There should be some good reason for making an exception to the rule. Where the complainant has not prosecuted his suit with diligence, and no insuperable mischief can be done to the party by dissolving the injunction, the court will not deny the defendant the benefit of his answer.

This case was heard at Newark, April 26th, 1852, on a motion to dissolve the injunction on bill and answer. The facts of the case sufficiently appear in the opinion of the Chancellor.

Mr. G. Vroom for complainant.

Mr. Schenck for defendants.

THE CHANCELLOR. The complainant on filing his bill obtained an injunction against the defendants, to prevent them from selling, leasing, or incumbering certain real estate in the county of Middlesex, the subject matter of this controversy. The defendants have filed their answers, severally, to the bill. The motion is made to dissolve the injunction for the reasons—First: that the equity of the bill is answered and fully denied—and Secondly: that the complainant has not prosecuted his suit with diligence.

The complainant was the owner of a farm in the county of Middlesex, consisting of about one hundred and ninety-six acres; and the defendant, Peter Hoey, owned five lots in the village of Williamsburgh, in the State of New York, upon which were five brick dwellings. The complainant bargained

with the defendant, Moore, who acted as Hoey's agent, for the exchange of the farm for the dwelling houses and lots. The agreement was reduced to writing, and mutual conveyances were afterwards made. The bill admits that there was a verbal agreement between the parties respecting the adjustment of the interest due upon the incumbrances mentioned in the written agreement. In the deed from Hoey to the complainant, he covenants against all incumbrances against the property, except mortgages to the amount of six thousand dollars, and the expenses due thereon. The complainant's allegation is, that the defendants deceived him in reference to the amount of interest due on the mortgages, and as to the expenses, which were expenses of foreclosure, amounting to about seventy dollars. The amount in dispute is perhaps three hundred dollars.

The answers fully meet the equity of the bill, and the allegations are all answered in their letter and spirit. This was admitted by the complainant's counsel, but he insisted it was a case where the injunction should be retained, although the equity may be answered. There are certainly exceptions to the general rule, but in making those exceptions, the court will be governed in some degree by the consequences to follow upon the dissolution, and by the conduct of the complainant in prosecuting his suit. There should be some good reason for making an exception to the rule. If no irreparable mischief can ensue, nor any serious injury to the party, the court ought to have grave doubts as to the propriety of dissolving the injunction before they will deny to the defendant the benefit of his answer. I am unable to perceive any reason why, in the case before me, I should deny the motion. A notice of the pendency of this suit, it is admitted, has been filed with the clerk of the county where the lands lie, which will protect the complainant against any subsequent purchaser or mortgagee.

The complainant has not prosecuted his suit with that diligence which entitles him to further favor from the court. The bill was filed on the 23d April, 1851, and the answers on the 8th of July following. The defendants, at least twice

before, have given notice of motions for dissolution. At one time the then Chancellor was engaged, and could not hear the motion; and the second time he declined, for satisfactory reasons given to the respective counsel. And yet, notwithstanding this evidence of a determination on the part of the defendants, to prosecute any advantages they might have, the complainant has allowed his cause to sleep. For nine months he has not taken a single step to bring the suit to a hearing, by taking evidence or otherwise.

The motion is allowed with costs.

GEORGE TURNER, JOHN ALLISON and JOSEPH W. ALLISON *v.* JAMES L. DICKERSON.

In a bill for discovery merely, it will be sufficient for the court to see that the discovery is material to the defence at law of the party seeking the discovery, and how, and in what manner it is material.

But where it is asked that a suit at law *should be delayed*, or the bill prays *relief* as well as discovery, the complainants should aver that the discovery sought for *is necessary to his defence*, and that the plaintiff is unable to proof such facts by other testimony.

This case was heard before the Chancellor, April 26th, 1852, at Newark, on motion to dissolve the injunction on bill and answer. The contents of the bill are set out in the opinion of the Chancellor, so far as necessary, to a clear understanding of the case.

Mr. F. Frelinghuysen for motion.

Mr. Chandler contra.

THE CHANCELLOR. James L. Dickerson commenced an action in a plea of trespass on the case upon promises, in the circuit court of the county of Morris, against the complainants, George Turner, John Allison and Joseph W. Allison. Issue was joined in the said suit upon the plea of payment. This bill was filed on the second day of August, 1850. It seeks relief upon the ground that the promissory note upon which the action at law was brought, was a joint and several promissory note of the complainants—that John Turner and John Allison were, in fact, only sureties, and that when the note became due and payable, John Allison aided Joseph in raising seventy dollars towards the payment of the note, and that Joseph paid the amount due on the note, to Dickerson, at maturity.

On filing the bill, an injunction issued to stay the proceedings at law.

The defendant has answered the bill, and upon his answer now moves for a dissolution of the injunction.

The bill should have been demurred to, for it is difficult to perceive upon what ground it can be maintained. It is endorsed as a bill for discovery and relief, and yet it is no more a bill of discovery than every bill filed in the court may be considered as such.

There is the general allegation in the bill that the complainants are without adequate remedy in the premises by the strict rules of the common law. But there is not an allegation in the bill that the aid of this court is required for the purpose of discovery, or that the plea of payment cannot be sustained by proof within the reach of the parties by the process of the court of law.

There is no case made by this bill to give the court jurisdiction for the purpose of relief, and the only way by which the court could get possession of the cause, and hold it for such purpose, would be in consequence of its being technically a bill for *discovery* as well as relief, and possessing those essentials which distinguish it as a bill of discovery.

In this case, relief is prayed for, and the aid of the court interfering with the proceedings of a court of law.

There is an essential difference between a bill purely for discovery, and a bill seeking a relief also, or an interference with the proceedings of another court, as well as discovery.

In a bill for discovery merely, it will be sufficient for the court to see that the discovery is material to the defence at law of the party seeking the discovery, and how, and in what manner, it is material. (Story's Eq. Ju. 324.) But where it is asked that a suit at law should be delayed, or the bill prays for relief as well as discovery, a very different rule prevails. Chancellor Kent, in Gilston *v.* Hoyt, 1 Johns. Ch. R., 547, which was a bill for discovery, and to enjoin proceedings in a suit at law, says: unless, therefore, the bill states affirmatively, that the discovery is really wanted for the defence at law; and also shows, that the discovery might be material to

that defence, it does not appear to be reasonable and just, that the suit at law should be delayed.

If the complainant in a bill for discovery wishes to obtain an injunction to stay the defendant's proceedings at law until the putting in of an answer to such bill, he must aver that the discovery sought for is necessary to his defence, and such averment must be verified by his oath. March *v.* Davison, 9 Paige, 580.

There is no averment in this bill that the complainants need any discovery from the defendant to aid them in the defence of the suit at law, nor are there any facts stated in the bill from which it can fairly be inferred that the complainants really require the aid of this court for any such purpose.

In the case of Appleyard *v.* Seton, (16 Vesey, 223,) it was ruled that an injunction to stay a trial at law must be founded on affidavit, stating the belief of the party that the answer will furnish discovery material to his defence.

But this bill does not simply ask the interference of the court to delay the proceedings at law, until, by their answer, the defendants may have made the discovery. But it seeks to transfer the jurisdiction of the suit at law to this court, and to have the whole case finally decided here upon its merits.

This bill for such a purpose is altogether defective. The essentials of such a bill as laid down in Story's Eq., Ju., § 74, are sustained by numerous cases, and may be considered as well settled. To maintain the jurisdiction for relief, as consequent on discovery, it is necessary in the first place to allege in the bill that the facts are material to the plaintiff's case, and that the discovery of them by the defendant is indispensable as proof. The bill must allege (and if required, the fact must be established,) that the plaintiff is unable to prove such facts by other testimony.

The defendant has seen proper to waive these objections to the bill, so far as to give to the complainants the benefit of his answer. Whatever that may amount to, I cannot deprive

the complainants of any advantage it may afford them. They are entitled to use it in the suit at law.

I do not deem it necessary to express any opinion as to the question discussed on the argument of the motion to dissolve, viz: Whether the answer meets satisfactorily the case made by the bill?

Let an order be made dissolving the injunction with costs.

HENRY C. STIMSON *v.* JOHN E. BACON *et al.*

The Chancellor endorsed on a bill the usual order for an injunction to issue on filing the bill, and the bill was not filed for four months after the order was made. A sheriff's sale had been delayed by the proceedings, although no injunction had actually been issued.

***Held*, that the proceedings were altogether irregular, and the bill must be dismissed with costs.**

That the bill should have been filed, whether the injunction was made use of or not.

On motion to dissolve injunction:

Mr. Woodruff for the motion.

Mr. Canfield contra.

THE CHANCELLOR. The bill was sworn to on the seventh day of July, 1851. In aid of the relief sought, an injunction was prayed for, to enjoin a sale by the sheriff of the county of Passaic, upon a judgment and execution at law.

On the bill being presented to the Chancellor, he endorsed upon it the usual order for an injunction to issue on filing the bill. There is no date to the order. But the sale enjoined was advertised for the seventh day of July, the day the bill was sworn to, so that the order must have been made on that day.

The bill was not filed until the twelfth day of November last, more than four months after the order was made. It appears by the certificate of the clerk that no injunction was issued from the office, and yet, it is admitted, that by the proceedings referred to, the sale has been in some way delayed until this time.

This proceeding was altogether irregular, and cannot be sanctioned by the court. The bill should have been filed

without delay. The reason given on the argument why it was not filed was, because the complainant had hopes of making some arrangement with the defendants, to render it unnecessary for him to use the injunction.

The bill should have been filed whether the injunction was made use of or not. I feel it my duty not to dissolve the injunction merely, but to declare the proceedings irregular, and order the bill dismissed with costs.

CASES

ADJUDGED IN

THE COURT OF CHANCERY,

OF THE STATE OF NEW JERSEY,

OCTOBER TERM, 1852.

ROBERT CHAMBERS, executor of JAMES HAMILTON, deceased, complainant, and PAUL TULANE, defendant.

It is well settled that a court will not compel a party to pay his money and take a doubtful title, or an encumbered property, unless the party has bargained for such—Although a complainant acted in good faith, and supposed he could give a good title to real estate he had agreed to convey, the defendant will not be compelled to a specific performance where he must take his title subject to any incumbrance not agreed upon.

A testator devised as follows: "It is my will and desire that all and every part and parcel of my real and personal estate *hereinbefore not devised or bequeathed*, after my son H. arrives at the age of twenty-one years, in case his mother hath then departed this life, shall be sold *at the discretion of my executors.*"

Held, that land which *had been* devised by the will, but which by the terms of the will had returned and become part of the testator's estate, was not embraced in the power of sale.

That the *power to sell* is given to the executors by *implication*. It is a personal confidence confined to them. It is not transmitted to the executor of an executor.

The bill in this cause was filed to compel a specific performance of an agreement in writing, executed between the complainant, as the executor of the last will of James Hamilton, the younger, deceased, and the defendant, Paul Tulane.

The agreement is for a house and lot of land in Princeton, which the complainant agrees to convey to the defendant, and the defendant agrees to purchase, at a price specified.

The defendants, by their answer, resisted a specific performance, on the ground that the property was a part of the real estate of which James Hamilton, the elder, died seized; that it was disposed of by his will, and James Hamilton, the younger, took only an interest with several other children of his father; that no power was given to the executor of the said will to sell the land; that if any such power was given, it was not transmitted by operation of law or otherwise, to the complainant, as the executor of James Hamilton, the younger.

James S. Green for defendant.

The bill sets out the wills of the two Hamiltons, 1st and 2d, and also the articles of agreement between Robert Chambers, executor of James Hamilton, 2d, and the defendant.

The answer admits the agreement, but insists that he should not be compelled to fulfil the agreement on his part by the payment of the money, as the complainant, as executor of Hamilton, 2d, cannot make a good title. The answer also sets out who are the heirs of Hamilton, 1st, and also that a part of the property agreed for is leased to Robert E. Hornor.

Abraham Vanduyn, the surveyor and scrivener, and William P. Sherman, who has the custody of the Hornor lease, were examined as witnesses.

There is no dispute that the property agreed to be conveyed, belonged to James Hamilton the 1st, and is the same with that which is devised, a part in the fifth clause of his will, (set out in the bill) to James Hamilton, 2d, and a part to Henry K. Hamilton.

On a bill for specific performance, a want of good title is a good defence. A decree for a specific performance is peculiarly within the discretion of the court. *Saxton's Ch. R.*, 281; 1 *Green's Ch. R.*, 366.

The complainant seeks the purchase money, $7,150, and ought to give a good title. 1 *Green's Ch. R.*, 524–526; *Sugden on Vendors*, page 410, in chapter 7, treating of the title which a purchaser may require.

And this does not depend upon the terms used in the articles of agreement, but the right to a good title is given by law. *Sugden on Vendors*, page 402.

2. As then the want of a good title is a good defence, let us next inquire:

1. Can Chambers make a good title?

2. Has he made or tendered a good title?

1. Can he make a good title? He acts as executor of James Hamilton, the 2d, who was the surviving executor of James Hamilton, 1st. We are to examine the will of James Hamilton, the 1st. Under that will this property is devised to James and Henry in fee simple—see 5th and 6th clauses. There is no power of sale given to the executor, the whole direction is to the devisee, and is as to the valuation.

The 8th clause in the will applies to the residue of the estate and expressly excludes what is previously given or devised.

Henry died without issue, and his interest in the real estate devised to him under the 6th clause, vested not alone in James, but his sisters with him—if it is to be controlled by the 8th clause, then as James died without issue, this and the residue of the real estate of James Hamilton, the 1st, vested in his surviving sisters.

2. Has he tendered a good title? He has as executor of James Hamilton, 2d, executed a deed or deeds to defendants.

While the general principle is not denied, that the executor of a deceased executor may execute the will of the first testator, yet this power does not extend to sales of real estate, unless in very clear cases.

James Hamilton, 2d, as executor of his father, James Hamilton, 1st, had no power to sell what was devised to Henry under the 6th clause, and could not give such a power to Chambers.

3. As the object of Tulane in the purchase was to obtain immediate possession, that object is defeated by the existence of the lease to Robert E. Hornor.

Wm. Halsted for the complainant.

The power of the executor of James Hamilton, the 2d, to sell all the estate devised or which he took under the will of his father is complete, by the power given to sell under his will. This covers the dwelling house and half-acre of land devised to James Hamilton, 2d, by the will of James Hamilton, the 1st.

Then there was also sold another half-acre by the executor, and included in his deed to the defendant, which half-acre is the land devised by James Hamilton, senior, to his son, Henry K. Hamilton. As to this part, Henry never took it under the will; he died before he arrived of age, and his mother survived him, and the condition of his paying his sisters never was performed; consequently that devise never taking effect, was precisely the same as if it never had been made, the property remained as a part of the estate of James Hamilton, senior, to be sold by his executor according to the directions of the will. The power of sale therefore under the will of James Hamilton, senior, covers this part of the estate sold.

The will of James Hamilton, senior, evidently intends that the whole of his estate shall be sold and the money divided in the mode indicated. For it says: "The amount of sales arising from *the above real and personal estate*," &c. Again it says, that if Henry dies without issue, the land devised to him "to be returned and become a part of the testator's estate." Henry died without issue, and even under this clause

the property devised to him, if it ever vested in him, returned to the estate of James Hamilton, senior, and was a part of the estate described as "*his above real estate*," which was directed to be sold; so that in either event it was to be sold, and was therefore properly sold by the executor of his executor.

As to this property being in lease, that don't affect the title; besides, the agreement was verbally, that Tulane was to take all the tenants and collect the rents.

THE CHANCELLOR. The complainant seeks to enforce the performance of an agreement in writing, made and executed between himself, as the executor of the last will of James Hamilton, the younger, deceased, and the defendant, Paul Tulane.

The agreement is for a house and lot of land in the borough of Princeton, which the complainant agrees to convey to the defendant, and the defendant agrees to purchase at a price of seven thousand one hundred and fifty dollars.

The defendant, by his answer, resists a specific performance, on the ground that the property in question is part of the real estate of which James Hamilton, the elder, died seized, and which was disposed of by his will; that James Hamilton, the younger, is not the sole devisee of the land mentioned in the agreement, but takes only an interest with several other children of his father; that no power is given to the executors by the said will to sell this land, and that if any such power is given, it is not transmitted, by operation of law, or otherwise, to the complainant, as the executor of James Hamilton, the younger.

Looking at the bill alone, I cannot ascertain what the question in controversy is between the parties, nor can I see that it makes any case, calling for the court's interference. It is true, with the aid of the answer, and of the briefs of counsel, I can see that there are questions which may arise of very considerable importance, but they never can arise upon any facts stated in the bill.



The agreement set out by the complainant is one executed between himself, as the executor of James Hamilton, the younger, and the defendant. First, the will of James Hamilton, the younger, is set out at length. The bill then alleges that James Hamilton, the younger, was, at the time of his death, the executor of his father's will. Then the will of the father is introduced at length; then follows the agreement in question and then the allegation that the complainant tendered the deed in pursuance of the agreement, and that the defendant refused to receive it. And this is the whole case made by the bill. What connection the will or estate of James Hamilton, senior, has with this agreement, or how, in an agreement between James Hamilton, junior's, executor, and the defendant, a controversy can arise, involving the question mainly discussed on the argument—whether the executor of an executor can execute a power conferred on the former by the testator, to sell lands, in no manner appears; nor is there an allusion to any facts or circumstances, by which it could be conjectured that any controversy as to these matters could possibly arise.

The bill does not state, nor intimate, whose lands these were, that the complainants agreed to convey to the defendant; whether they were lands of which James Hamilton, sen., died seized, and if so, how the right to sell them devolved upon the complainant; or whether they were part of the real estate of the complainant's testator; or whether they were the complainant's own lands. The complainant shows no right, title, or interest in any way, to the land embraced in the agreement; and if, in this case, I decree a specific performance, I must compel the defendant to pay upwards of seven thousand dollars, without the complainant's showing, or even alleging, that he has any right whatever to execute the conveyance for which this consideration is paid.

But it appears by the answer, and the arguments of counsel on both sides were based upon the assumption, that the land which has given rise to this suit, was land which belonged to the real estate of which James Hamilton, the elder, died seized; and part of which, the complainant alleges, James Hamilton,

jun., as executor, was empowered, by his testator's will, to sell, and which power, by his death, was transmitted by law to his executor, who is the complainant; and the other part of which James took, as devisee under his father's will.

As the questions arising upon such a state of facts have been fully discussed, and the complainant may amend his bill to correspond with the facts as they exist; and as both parties desire a settlement of the questions involving their respective rights, I will consider the bill amended in the particulars referred to.

But there is another defect in this bill which must be removed before the questions alluded to can be properly presented for determination to the court.

James Hamilton, sen., left his wife Sarah executrix, and his two sons, James and Henry, executors of his will. Whatever power of sale was conferred by the will, was to be exercised after the decease of his wife Sarah, and after Henry arrived at the age of twenty-one years.

Admitting, that by the will, the power of sale of the land in question was conferred on the executors, there can be no pretence that the complainant, in the capacity of executor to the will of James, can have any right to interfere with the execution of the will of James Hamilton, sen., if Henry, the other executor, is living. The bill does not show that Henry is dead, or that he has renounced, or by what right this complainant can supersede him. The answer alleges that Henry is dead. But how is the fact? Must the court take the case as made by the bill, or by the answer? Though the fact is stated in the answer, the complainant may, or may not be, willing to take it as part of his case. But I suppose the fact to be, that Henry is dead—that he died before James Hamilton, jun., and that the complainant is the executor of the surviving executor of the will of James Hamilton, the elder.

Upon this assumption, let us examine whether the complainant can fulfil his part of the agreement, and can give to the defendant a good title to the land embraced in it. It is admitted, that if he cannot, the defendant ought not to be held to a specific performance.

In examining this question, I must draw my facts from the briefs of counsel. As there stated, they are admitted to be correct, and the pleadings must be amended to correspond.

It is admitted, that part of the land in controversy is embraced in the devise in the *fifth* clause of the will; and the residue in the devise contained in the *sixth* clause.

As to the portion embraced in the fifth clause, the complainant insists, it was devised to James Hamilton, the younger, in fee simple; and that, as there is no dispute, but that ample power is given to the complainant by the last will of James Hamilton, the younger, to sell all the real estate of which he died seized, the complainant can make a good title for that part of the land covered by this agreement. And as to the residue, namely, that embraced in the sixth clause, the complainant insists, he has the right to sell and convey it, by virtue of a power of sale contained in the will of James Hamilton, the elder.

To the devise made to his son James, in the fifth clause of the will, as well as to the devise to Henry, in the sixth clause, the testator annexes this condition, "and it is my will that after those two events, (these two events were the death of his widow and his son Henry's arriving at lawful age,) mentioned in the above fifth and sixth sections shall have taken place, the two lots aforesaid shall be valued by discreet and indifferent persons, chosen by the parties, and that they, my two sons, shall pay to each of their surviving sisters, or to their lawful representatives, each one equal share, they my said sons reserving to themselves each two equal shares therein."

There is no pretence that this valuation has ever been made, or that these sisters have released their interest in the lands. If I compel this defendant to a specific performance, he must take his title subject to this incumbrance, whatever it may be. In decreeing a specific performance, the court must exercise its discretion—not an arbitrary discretion—but a discretion regulated and governed by established principles. As a general principle, it is well settled that the court will not compel a party to pay his money and take a

doubtful title, or an incumbered property unless the party has bargained for such. There is no pretence that such was the case here. The complainant acted in good faith. He supposed he could give a good title to the land, and such was the understanding of both parties in entering into the agreement. If there was no difficulty except the one referred to, I should not be willing to decree a performance of the agreement.

But with regard to the property embraced in the sixth clause of the will, there is an additional difficulty.

The testatator gives and devises to his son, Henry K. Hamilton, a lot of land situated in Princeton, together with the shop and appurtenances thereunto belonging, after he arrives at full age, and after the decease of his mother. In a subsequent part of the will is this devise: "and should any of my aforesaid sons or daughters die without leaving lawful issue, it is my will that the legacies of such herein devised or bequeathed shall return and become part of my estate, and be divided among the survivors of them according to former divisions, sons each two shares, and daughters each one share."

Henry died without leaving lawful issue, and according to the will, the land devised to him, returned and became part of the testator's estate.

But is the power to sell this land given by the will to James Hamilton, the surviving executor? If no such power is given to him, the complainant cannot possess it, even admitting that by law the power of sale given in this will is transmitted to the executor of the surviving executor.

The only power of sale given to the executors is to be found in the eighth clause of the will.

"It is my will and desire, that all and every part and parcel of my real and personal estate hereinbefore not devised or bequeathed, after my said son Henry K. Hamilton arrives at the age of twenty-one years, in case his mother hath then departed this life, shall be sold at the discretion of my executors," &c.

This power to sell then, extends only to the real and per-



sonal estate not in his will before devised or bequeathed by the testator; and as the land in question had been previously devised to Henry, the power of sale did not reach it.

It was argued by the complainant's counsel, that Henry having died, without leaving lawful issue, and by the terms of the will the land so devised having returned and become part of the testator's estate, it was embraced in the power of sale. But not only was the power to sell confined to the real estate "*not devised or bequeathed*," but a disposition of this land devised to Henry was, in the event which has happened, actually disposed of, independent of the power of sale. It was to be divided among the surviving devisees named in the will "according to former divisions, sons each two shares, and daughters each one share." I am of opinion, therefore, that the complainant can give no title to that part of the land included in the agreement which James Hamilton devised to his son Henry.

As to the other question argued: Whether the power of sale given by the will to the executors, is by law transmitted to the complainant—I am of opinion that it is not.

The principle involved in this question has undergone a most elaborate and able investigation by Mr. Justice Cowen, in the case of *Conklin v. Egerton's Administrator*, 21 *Wendell*, 432; 25 *Wendell*, 224; and the results he arrives at commend themselves to my judgment.

It must depend, like all other questions arising upon the will, on the intention of the testator. If the power is given to individuals indicating a personal confidence in them, it must be confined to those upon whom it is specifically conferred.

It was held at a very early period, that if a man declare in his will that B and C, his executors, shall sell his land, and die, and B dies, and C makes D his executor, and dies, and D sells, this is void, for the trust is strict. In the absence of a clear intention, the representative of an executor could not exercise a power vested in the executor. (See *Sugden on Powers*, 145.)

In the case of *Cole v. Wade*, 16 *Ves.* 44, the master of

the rolls, Sir William Grant, says, "I conceive, that wherever a power is of a kind that indicates a personal confidence, it must *prima facie* be understood to be confined to the individual to whom it is given; and will not, except by express words pass to others, to whom by legal transmission the same character may happen to belong."

He cites a case from *Moore*, where one of the judges doubted whether a power, implying personal confidence, would, even by express words, pass to executors of an executor. That the executor of an executor has full power and authority by law, to execute the will of the original testator, there can be no doubt: but this power and authority, conferred by law, extends only to the duties properly appertaining to the office of executor. It is the duty of an executor, which the law imposes on him, to pay the debts, distribute the fund, and settle the personal estate of the testator; and these duties, are by law, transmitted to his executor. But it is no part of an executor's duty to sell the real estate; and he cannot meddle with it, unless by authority of the statute in particular cases, or by the express directions of the testator. If it is transmitted to his executor, it can be only by the direction of the person by whom the power was conferred—it must be by the intention of the original testator, and not simply because the duties of the executorship devolve upon him.

If, then, the complainant can sell the land in question, he derives the power from the will conferring the trust, and not because it is a duty transmitted to him by law, and appertaining to him *virtute officie*.

In this case, the testator reposes a special confidence in his executors, by express words, and in an emphatic manner; a confidence which they cannot delegate, and which the law will not transmit in any way to others. The testator's language is, "shall be sold at the *discretion* of my executors."

The power of sale is given to the executors *by implication*. The testator does not direct by whom the designated lands shall be sold, and the power is implied from the fact that they are to be sold at the discretion of the executors.

Now this distinction has been drawn: that where the power is an implied one, a surviving executor may execute it, and his executor also, but not where it is given by express words. *Sugden on Powers*, 138, and authorities cited by Justice Cowen in 21 *Wendell*, 436–437.

But it will be seen on an examination of the cases, that this distinction exists where the implication arises from the fact, that some duty is to be performed by the executor, which appertains to him in the discharge of his duty, by virtue of his office, as paying of legacies and debts, or the distribution of the fund. A testator having ordered his lands sold for the payment of his debts—the payment of his debts devolving upon his executor—by implication the power of sale is in him to discharge the duty imposed upon him; and as the executor of the executor executes the will as the personal representative of the original testator, it may well be argued, that he may exercise the power of sale, by the intention of the testator—the power being conferred upon the individual upon whom the duty devolved of paying the debts.

But the power of sale conferred by this will is not implied from any duty to be discharged by the executors as the personal representatives of the testator, but from a special confidence, which, by express words, he reposed in them. If the power was implied from the fact, that they were to pay the debts of the testator, or to distribute the fund, the duty to pay these debts, or distribute this fund, devolving upon this complainant, the power might, perhaps, be properly considered to exist with the duty—the power originating from the duty—they exist together.

But, surely, where the power is implied, as in this case, from the fact, that the testator reposed confidence in the discretion of his executors, it cannot be argued that he could have had any intention of confiding in the discretion of some, to him, unknown person, whom his surviving executor might appoint. If the complainant can sell the original testator's lands, it is because the testator directed them to be sold at the discretion of his sons. They will be sold,







it is doubtful whether he will not be personally liable for them, and whether he can take them out of the estate of his testator.

not in compliance with the testator's wishes and directions, but in violation of both, and by a person whom he never contemplated. There is no office, or duty, to be discharged by this complainant, as the personal representative of the original testator, from which a power of sale can be implied.

In addition to the objections already referred to, to the exercise of the power of sale by this complainant, I very much doubt whether it is a power which can be exercised, except by the executors to the original will, jointly. If it cannot, there can be no pretence that it can be exercised by the complainant. A mere naked power does not survive. Such a power cannot be exercised by a surviving executor by the common law. By our statute (*R. S.* pages 356–357, sections 19 and 20) a surviving executor, or an administrator with the will annexed, may sell land pursuant to any power or direction in the will, unless it shall be otherwise expressed in said will. But no such authority is conferred by the statute upon an executor of an executor. Is the power of sale in this will, any thing more than a naked power? It is true the executors have an interest in the land with other devisees in the will named. But this is not what is meant by *a power coupled with an interest.* These lands are not devised. The title descended to the heirs at law. No interest is devised to the executors, and they have no control over the land as executors, until the happening of certain events, and then, the only power conferred is to sell.

I am of opinion that this complainant has no power to sell the land in question.

For the reasons given, the prayer of the bill is denied, and the bill ordered to be dismissed. I think the defendant should take his decree without costs. The complainant in the whole transaction acted in good faith. The authority by which he claimed the right to sell was known to the defendant, and both parties acted under an impression that it was a valid authority. The complainant had the written opinion of counsel that he could give a good title. If I put the burthen of the costs of the suit upon the complainant,

it is doubtful whether he will not be personally liable for them, and whether he can take them out of the estate of his testator.

THOMAS S. SMITH *v.* ELIZABETH ESPY, HENRY FREAS, JR. *et al.*

A deed fraudulent as to judgment creditors, may be impeached by a purchaser holding a conveyance under that judgment; but such purchaser stands in no better situation than the judgment creditor filing a bill to avoid the alleged fraudulent deed. To ascertain therefore the rights of the complainant, and whether he is entitled to the relief sought by his bill, we must examine into, and ascertain, the rights of the judgment creditors under whom he claims.

One cannot question a conveyance as fraudulent against himself as a creditor, who advised and counselled its execution, who drew the deed knowing it was intended to answer a fraudulent purpose, and as a master of this court took its acknowledgment.

A court will refuse to listen to any explanations of a subsequent transaction between the *parties* to a fraud, as an antidote to the poison infused into the original transaction. But where one who had been no partaker in the iniquity of the transaction became a party to a deed with no intention of defrauding any one, and at a time when there was no person who could be injured by her accepting it, and where neither party contemplated any improper use to be made of the deed then or thereafter; and where the complainant claims under judgment creditors not standing in a position entirely aloof from the fraudulent transactions, the deed will not be set aside as fraudulent.

The complainant is a purchaser of the real estate in controversy, under a judgment against Henry Freas, Jr. Elizabeth Espy holds the property, by deed, from Henry Freas, prior to the judgment. The bill is filed to set aside that deed on the allegation that it is fraudulent, and was made and executed by Henry Freas, Jr., to defraud his creditors.

The cause was heard on the bill; the separate answers of Elizabeth Espy, Henry Freas, Jr., and A., another defendant, and proofs taken on both sides. The bill alleges that the defendant, Henry Freas, Jr., having some title to the land in question, on the fifth of May, 1846, fearing that his guardian was about to obtain a decree against him in the orphans' court of Salem county, with the advice of his brother William, executed a deed for the land to his mother-

in-law, Elizabeth Espy, a poor woman, who worked for her living; that A. acted as counsel, and drew the deed, and as master in chancery took the acknowledgment; that at the time of its execution Henry said that the deed was made to defraud his guardian and other creditors, and that no consideration was paid.

That E. and A. in May, 1849, recovered a judgment in attachment against Henry Freas, Jr., in the Salem circuit; that under this attachment this land was attached and sold to one Josiah S. Hacket, and a deed made to him, and that subsequently Hacket and wife conveyed to the complainant; that Elizabeth Espy admitted to A. that she had never paid any thing for the deed, yet she meant to hold it to prevent Henry's creditors from getting the land, and meant to hold it for Henry's children.

The bill prays that the deed to Elizabeth may be set aside and declared void as against the complainant, &c.

A. in his answer says, that Henry applied to him to draw the deed; told him he wanted to execute it to cheat his guardian and other creditors; that he drew the deed, and as a master in chancery took the acknowledgment, and he admits all the other matters charged in the bill, as within his knowledge.

Henry Freas, Jr., gives the following account of the execution of the deed in question:

"This defendant some time prior to the execution of said deed, had proceeded in the proper court of Salem county, aforesaid, against his testamentary guardian, Henry Freas, to recover moneys which it was supposed were unjustly withheld by said Freas, in the settlement of his accounts as guardian. The management of such proceedings was intrusted by this defendant to A. as his attorney, who is named as one of the defendants in complainant's bill. For some reason which defendant cannot explain, the suit or proceeding was decided against him, and a decree or judgment was entered for the costs of the same, which decree or judgment, as defendant was instructed, became a lien upon the said

interest in the real estate in Salem county, owned by him. And defendant also says, that sometime afterwards, on or about the 9th day of June, A. D. 1846, he, together with his brother William, (who is also named as defendant) called on said A., then on a visit in Philadelphia. The conversation turned on the decree or judgment which had been lately obtained by said Henry Freas, against this defendant, and its effects upon his said interest; whereupon the said William Freas suggested that this defendant should make a deed for said interest to some one whom defendant should name. The said A. acting as attorney for this defendant, advised that this should be done, and that it should be antedated so as to make it appear as if the deed had been made before this decree or judgment had been entered. A. then agreed to draw the deed and have it ready in the course of a day or two, when the defendant was to call and execute it. At the meeting here referred to, upon its being suggested by this defendant that probably Mrs. Espy, whose name had been proposed by said William Freas, as a suitable one to be used in said deed, might object to her name being so used; the said A. remarked, that that would make no difference, as it was a mere matter of form. And this defendant further says, that he assented to Mrs. Espy's name being used in said deed because he was indebted to her at that time, as hereinafter stated, and it was his desire and intention, so far as he could do so, to protect her, while under the advice given as aforesaid, he was endeavoring to protect his interest in said real estate.

"And this defendant also says, that Mrs. Espy was not consulted in reference to the making of said deed, nor was she advised that it was to be made. Said deed was made without her knowledge, and she was not informed of the existence of the same until long after the date of the transaction, as is hereinafter set forth.

"And this defendant further says, that on or about the 11th of March, 1847, being greatly in want of money, and being indebted, as hereinafter stated, to his mother-in-law, the said Elizabeth, in the sum of ninety dollars, for which he

had on the fourth of February, 1846, given to her a promissory note, in the words and figures following, to wit:

"'PHILADELPHIA, Feby. 4, 1846.

"'I promise to pay Elizabeth Espy, or her heirs, the sum of ninety dollars, lawfully borrowed money, which is borrowed of her for one year from the date, Feby. 4, 1846.

"'HENRY FREAS.'

"'Which note had been given for money on the day therein specified by her, actually and in good faith lent and advanced to him, and which sum of money was fully due and payable. This defendant, in consideration of such indebtedness, and which as hereinafter stated he had previously endeavored to secure to her in making said deed, and which indebtedness he was not otherwise able to pay off and liquidate, and in consideration also of a further sum of sixty dollars in cash to him actually and in good faith paid by the said Elizabeth Espy, which sum, with the said promissory note, made up the consideration mentioned in said deed, did, absolutely and without any condition, deliver to said Elizabeth the said deed, dated 5th day of May, 1846, and took back from her the said promissory note.

"And this defendant further says, that the said Elizabeth had not been informed of the existence of said deed until on or about the said 11th day of March, 1847, when it was communicated by him to her, together with the reasons for which it had been made, and the fact that the decree or judgment which had been obtained by said Freas, was then entirely settled and out of the way."

The defendant, in his answer, further alleges, that on the 11th of March, 1847, he had no creditors, except Mrs. Espy, and that besides her, A. was the only one who pretended to have any claims against him. He denies that A.'s claim was a just one. He denies any knowledge of the conversation alleged to have taken place in reference to the deed between A. and Mrs. Espy.

Mrs. Espy's answer corresponds in substance with that of Henry Freas, and she expressly denies the alleged conversation with A.

The evidence offered in support ol the pleadings, sufficiently appear in the opinion of the Chancellor.

A. L. Eakin and *Samuel A. Allen* for the complainant, cited *Deale v. Paige*, 2 *Green's Ch. R.* 143; *Boyd v. Dunlap*, 1 *Johns. Ch. Rep.* 478; 2 *Hill's Rep.* 27; 3 *Hill's Rep.* 513; 7 *Alabama Rep.* 269; 22 *Maine Rep.* 360; 1 *Hal. Ch. Rep.* 76; *Hart v. Teneyck*, 2 *Johns. Ch. Rep.* 90; *Vanderhoof v. Clayton*, 2 *Hal. Ch. Rep.* 192.

John T. Nixon, for defendants, cited 8 *Wheat. Rep.* 242; 1 *Hare & Wal. Am. Lead. Ca.* 55 *et. seq.*; 1 *Conn. Rep.* 525; *Lush v. Wilkinson*, 5 *Ves.* 384; *Battersbee v. Farrington, et al.*, 1 *Swan. R.* 106; 18 *Johns. Rep.* 515; 1 *Story's Eq. J.* 334 *et sequitur.*

THE CHANCELLOR. The only witness on behalf of the complainant as to the allegations of fraud contained in the bill, is E. He details a conversation, which took place some time after the execution of the deed, between himself and one of the defendants, Henry Freas, jr., the grantor in the alleged fraudulent conveyance. This evidence was objected to when taken before the master. As a general rule, what the grantor says to a third person, not in the presence of the grantee, either before or after the execution of the deed, is not legal evidence against the grantee, and cannot be used to invalidate his title. At the time of this conversation, the deed was on record, but there had been no delivery of it to Elizabeth Espy; and it is admitted, that at the time she knew nothing of the deed—there had been no negotiation between herself and Freas in reference to it, and she was a stranger to the whole transaction. At that time, she had no rights which could be impaired by any thing Freas could say. The conversation was respecting a passed transaction, with which, it is admitted, Mrs. Espy

had had nothing to do. It was not in reference to any contemplated negotiation, which was to take place between Freas and Mrs Espy. In this view, the evidence is not objectionable. But did I consider, that this evidence operated to the disadvantage of Mrs. Espy's rights, I should admit it with great reluctance. If Mr. E. had been compelled by the opposite party to give this evidence, it would be free from animadversion. But how is the fact? Freas makes this deed for the avowed purpose of defrauding a creditor. The attorney and counsel at law, who is made a defendant in the cause, for the purpose of discovery, admits he prepared the deed, and aided and abetted the debtor in his unlawful purpose. Some difficulty occurring between counsel and client, another counsel is selected, to whom the debtor reveals the transaction. By the aid of the latter counsel, the creditor is brought to a compromise. Subsequently, the debtor becomes further indebted to this counsel, and then, when this fraudulent deed is set up to defeat his claim, he volunteers to detail a confidential communication made to him by his client.

But this evidence, as far as the fraudulent purpose of Freas is concerned in executing the deed, does not vary the case from the one presented by the pleadings.

The answers of Henry Freas, jr., and of Elizabeth Espy, admit that the deed in question was made and executed at the time, for the purpose of placing the property beyond the reach of the guardian of Henry Freas, who had then lately obtained a decree, or judgment against him.

It is not alleged in the bill, that when the deed was executed, Henry Freas, jr., had any other creditor, than his guardian; although it is alleged, that he declared he executed the deed for the purpose of defrauding his guardian, *and other creditors*. The bill does not show, that the judgment creditors, under whom the complainant claims, were creditors at that time, or that the debts were contracted, in any manner, on the faith of Henry Freas being the owner of the property. It appears, however, in the case, that the debt to Mr. A. was contracted prior to the execution of the

deed, and the one to Mr. E. subsequent thereto. It does not appear that Freas had any creditors at the time the deed was executed, except his guardian and Mr. A., or any subsequent creditors, except Mr. E.

A deed, fraudulent as to judgment creditors, may be impeached by a purchaser holding a conveyance under that judgment; but such purchaser stands in no better situation than the judgment creditor filing a bill to avoid the alleged fraudulent deed. To ascertain, therefore, the rights of the complainant, and whether he is entitled to the relief sought by his bill, we must examine into, and ascertain the rights of the judgment creditors under whom he claims.

A deed executed with intent to delay, hinder, or defraud creditors, and others, of their just and lawful actions, suits, and debts, shall, in the language of the statute, "be deemed and taken to be clearly and utterly void, frustrate, and of no effect." But such deeds are good as between the parties, and as against all other persons, whose actions, suits, debts, accounts, damages, penalties, forfeitures and demands have not been, or may not be in any wise disturbed, hindered, or defeated by them.

Such a deed may be avoided, not only by existing, but by *subsequent* creditors. This was controverted on the argument, but the principle is established by numerous authorities. Where a distinction has been made between *existing* and *subsequent* creditors, it has been where the conveyance was not actually fraudulent, but the fraud was a legal inference from the debtor's embarrassment at the time, or from other circumstances. Whether the weight of authority in such cases favors this distinction may be questioned; but it is well settled, that in cases of actual fraud, the distinction does not exist. (See the numerous cases cited in 1 vol. *Am. Leading Cases*, 64–65, and 1 *Story's Eq.* 361.)

The judgment, under which the complainant claims, was in favor of A. and E. It is a judgment on attachment for the sum of one hundred and sixteen dollars and eighty-six cents. The debt of A. was thirteen dollars and twenty-six cents, and was contracted prior to the deed in question.

E.'s debt was fifty dollars and ninety cents, and was contracted October 9, 1848, more than two years after the date of the deed.

Could A. question this conveyance as fraudulent against himself, as a creditor of Henry Freas, jr.?

It appears, that the consideration of A.'s debt, was for services as a lawyer, rendered by him to Henry Freas, jr., in defending the claim prosecuted against Freas by his guardian, and to defeat which claim the conveyance was executed—that A., as Freas' counsel, drew the deed for this fraudulent purpose, and as a master of this court took the acknowledgment.

Henry Freas, in his answer, says, that he went with one William Fries, to consult Mr. A.—that in that interview William suggested that a conveyance should be made to some one in order to defeat the claim made against Henry by his guardian—A., as attorney and counsel, advised this should be done, and that the deed should be antedated so as to make it appear prior in point of time to a judgment or decree, which had been, or would shortly be obtained in favor of the guardian.

A., in his answer, admits, that he drew, and took the acknowledgment of the deed, and that Freas told him at the time he meant to cheat his guardian, and other creditors.

Upon what principle of equity can I set aside this conveyance in favor of A.'s debt?

Equity and the common law, abhor the fraud, and the statute law has given its sanction and authority to the court in discountenancing such conveyances. But to set aside such a deed for fraud, in favor of one who advised and counselled in its execution, would be in violation of every principle upon which this court administers equity.

Freas executed the deed to defraud his creditor. A. counselled and aided Freas in accomplishing his purposes, and it would be as inequitable that A. should be permitted to appropriate to himself the advantages of the conveyance, as it would be to allow Freas himself to do so.

The complainant, therefore, as far as he claims under A.

as a judgment creditor, is not entitled to the interference of the court. It remains to be seen whether he stands in any better situation claiming under E.

As has been already remarked, E. was not a creditor at the time of the execution of the deed. His debt was not contracted on the faith of Freas being the owner of this property. But this fact, as was before observed, will not prevent him, or the complainant claiming under him, from calling in question this conveyance, and impeaching it, on the ground of fraud. Was it a question between A. and Freas, or a person claiming under Freas, with knowledge of the fraud, or whose conveyance was in any way tainted with it, the case might be free from difficulty. Whether A. or the person claiming under him, is entitled to relief, must depend upon the nature of the title, and the respective equities of the complainant and defendants.

What is the situation of E. as respects the alleged fraudulent transaction? and how do his equities compare with those of Mrs. Espy, whose rights it is sought, by this bill, to supersede?

After the execution of the deed, A. turned his client over to E., and E. was retained as counsel to defend Freas against the claim which his guardian was prosecuting against him. Freas informed E. of the preparation he had made to defraud his guardian, and explained to him the manner, and the purpose for which the deed had been executed. E. undertook the cause, and the result was, that instead of the guardian's recovering his money against Freas, a compromise was effected, upon his guardian's paying Freas eighty dollars and also the costs of the suit, being eighty dollars more. What influence the fact of Freas having disposed of his property had in bringing the guardian to terms, we have no means of ascertaining.

Nearly a year after this transaction was closed, Freas became indebted to E. about fifty dollars for other professional services. Shortly after, A. issues the attachment, and E. comes in as a creditor under the same. No other creditor applies. The complainant holds under this judgment in

attachment. E., as solicitor, files the bill in this suit, and A. conducts the suit as counsel for the complainant. A. is also made a defendant to the bill, as a *particeps criminis* in the fraud. He answers and discloses the transaction, and admits the fraud.

All these circumstances, taken in connection, do not place E., as a judgment creditor, in a very favorable position to ask the aid of this court in setting aside the alleged fraudulent conveyance for his benefit. The complainant stands in no better relation claiming under him.

If this was the whole case, I should very much doubt the propriety of this court interfering. But taking into consideration the circumstances, under which Mrs. Espy holds her title, I am satisfied that the complainant ought to be left to his remedy at law.

Mrs. Espy denies all participation in the alleged fraud. She had no knowledge of the execution of the deed. It was executed and recorded, without any consultation with her, and she was ignorant of its existence until the following March, ten months after its execution. Her denial is not questioned, and she stands before the court with a clear conscience in reference to the transaction. The charge in the bill, that she declared to A. that she meant to hold the property to prevent Freas' creditors from getting his land, and for the benefit of Freas' children, is denied by her, and there is no proof to sustain the allegation.

The answer of the defendant, A., is no evidence of the fact.

At the time of the execution of the deed, Henry Freas was indebted to Elizabeth Espy in the sum of ninety dollars, for which she held Freas' note, bearing date more than eight months prior to the date of the conveyance.

On or about the 11th of March, 1847, which was more than eighteen months prior to the time when E.'s debt was contracted—at a time when Freas had no existing creditors, and after his settlement with his guardian—Freas informed Mrs. Espy of the execution of the deed. He told her the purpose for which it had been executed, but informed her

that the difficulty with his guardian had been adjusted, and offered to deliver to her the deed, if she would pay him sixty dollars, the difference between what he owed her and the consideration mentioned in the deed. To this she assented; paid him the sixty dollars and took the deed.

It is insisted on behalf of the complainant. First: That it is not proved that Mrs. Espy gave the consideration alleged, and that it is necessary to support this part of her answer by proof.

The principle contended for is a familiar one, and required no reference to authorities to support it; that any allegation of the answer which is not directly responsive to the bill, but sets forth matters in avoidance, or bar, is denied by the general replication, and must be proved *aliunde*.

The question is, whether this part of Mrs. Espy's answer is responsive to the bill, in such a view as will make it evidence for her.

The bill charges, that Freas executed the deed to defraud a certain creditor, that he did not deliver it to Mrs. Espy, and that she paid no consideration for it. Mrs. Espy admits this, but sets up a transaction which occurred some eighteen months afterwards, in avoidance of the consequences which must necessarily follow from such admissions. An avoidance is something *dehors* that which is admitted, and subsequent thereto. If a defendant admits the receipt of a certain sum of money on a particular day, and avers that he paid it over, that may discharge him; but if he alleges he paid it over at a subsequent time, or made an appropriation of it, by direction of the person for whom he received it, he must prove such allegations. *Thomson v. Lambe*, 7 *Ves.* 58; *Hart v. Teneych*, 2 *J. C. R.* 92. It is true, one of the interrogatories put by the complainant is, whether any consideration was paid by Mrs. Espy for the deed? but most certainly, this does not give the defendant a latitude of setting up, and explaining, a negotiation in reference to the consideration and delivery of the deed, which occurred some eighteen months afterwards. The answer, therefore, of Mrs. Espy, cannot be taken as evidence of the considera-

tion which passed between herself and Freas, or as an exp'anation of a transaction some months after the execution of the deed.

But I am perfectly satisfied with the testimony of Elizabeth Espy, the grand-daughter, who proves the whole transaction as it is alleged in the answer. Her testimony was questioned only on the ground of her extreme youth. She was fifteen years old when examined. Her testimony is clear, and is given, as far as we can judge of evidence taken by commission, as this was, with much intelligence. Her evidence bears on the face of it the impress of truth. She states many facts, to which others were witnesses, as well as herself, and some of which could have been impeached, if not accurately detailed by her. She shows one important fact, the contrary of which is alleged in the bill, and that is, the pecuniary ability of Mrs. Espy to pay the consideration money. If this was untrue, it could easily have been disproved; for she states the source from which Mrs. Espy received her means each week, in the city of Philadelphia. Her testimony proves the transaction as stated in the answers of Mrs. Espy and Henry Freas, jr.; and there is no circumstance in the whole case, that leads me to doubt, that we have the truth of the whole transaction between Mrs. Espy and Henry Freas, jr., in their answers. There is a frankness in the answers, corresponding with the case as it has been developed, which commends itself to the consideration of the court.

But the complainant further insists, that admitting Mrs. Espy's allegations to be true as to the delivery of the deed to her, and as to her payment of the consideration money; the deed having been fraudulently executed by Freas, and put on record, no subsequent arrangement or negotiation with regard to it, between Mrs. Espy and Freas, could purge it of the original fraud. If Mrs. Espy had been a partaker in the iniquity of the transaction, the position would be correct; and a court might well refuse to listen to any explanation of a subsequent transaction between the parties

to the fraud, as an antidote to the poison infused into the original transaction. But when she became, with her consent, a party to this deed, it was with no intention of defrauding any one, and it was at a time when there was no person who could be injured by her accepting it. Any improper use to be made of the deed, then, or thereafter, was not contemplated by either Freas or herself, I cannot see that Mrs. Espy has done any thing which does not comport with fairness and honest dealing.

My only doubt about the case has been, whether I ought not, on account of the smallness of the consideration given by Mrs. Espy, to allow the complainant to take the property, upon paying Mrs. Espy what she paid for it, with the interest. I would do so, if the complainant claimed under judgment creditors standing in a position entirely aloof from the fraudulent transaction. But, on reflection, I am satisfied to dismiss the bill, without costs to be paid by either party to the other.

The view I have taken of the case is no hardship upon the complainant. He purchased the property on speculation. The deed from Freas to Mrs. Espy was on record, and the complainant knew that the title he obtained would be of no value unless he could successfully impeach the deed for fraud. The whole case was before him, and he bought with his eyes open.

ZEPHANIAH VAUGHN v. AUGUSTUS S. JOHNSON and SAMUEL CAVALIER, administrators of CHARLES CAVALIER, deceased.

An answer, purporting to be an answer of two defendants, and signed by solicitor and counsel, as solicitor and counsel of the defendants, but sworn to by one only, is not what it purports to be. It is not the answer of the defendants, but of one of them only; and cannot, without the consent of the opposite party, be read as the answer even of the defendant who has sworn to it.

It is not sufficient to show that *injustice has been done in a trial at law*, to entitle the party to the interference of this court: but it must have been done under circumstances, which authorize the court to interfere. If a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again.

This court cannot grant relief on the ground that the court at law erred in overruling evidence. An interference on such grounds, would convert the Court of Chancery into a Court of Errors, and would be an assumption of jurisdiction which does not belong to the court.

If the defence is equally available at law as in equity, and the party has had an opportunity of making the defence at law, a court of equity has no jurisdiction to relieve against the judgment, unless some special ground for relief can be established other than that of an error in law committed by the court which had jurisdiction of the case.

As a general rule, this court will not interfere with a judgment at law, solely because the principal witness was mistaken as to facts, and was subsequently found to be in error.

Nor will relief be granted where the party has been deprived of his defence, in any manner through his own neglect or laches.

The complainant stated that he had been deprived of his defence in a trial at law, by the courts allowing parol proof of a judgment. *Held*, that against such a decision of the court, the complainant can obtain no relief here.

The defendants, as administrators of Charles Cavalier, deceased, obtained a judgment in the Atlantic Circuit, against the complainant. On filing the bill, an injunction was allowed, restraining the defendants, as plaintiffs in the judgment, from enforcing the same. An answer having been filed, the defendants now moved to dissolve the injunction.

Mr. *W. Halsted* for motion, insisted—

First: That the answer denied the equity of the bill.

Second: That the injunction should be dissolved and bill dismissed for want of equity.

Messrs. *Woodhull* and *Grandin*, contra—

First: The answer is irregular. It purports to be the answer of both defendants, and is sworn to by only one.

Second: The case made by the bill entitles the complainant to relief. (*Story's Eq. Pl.* § 869.)

Third: Complainant entitled to answer of both defendants. *Vliet v. Lowman*, 1 *Green's Ch. Rep.* 404; *Price v. Clevinger*, 2 *Green's Ch. Rep.* 208; *Scull & Thompson v. Reeves et al.*, 2 *Green's Ch. Rep.* 84.

THE CHANCELLOR. The defendants, as administrators of Charles Cavalier, deceased, obtained a judgment in the term of December last of the Atlantic Circuit Court, against the complainant. The complainant has exhibited his bill to be relieved against this judgment; and on filing the bill, an injunction was allowed, restraining the defendants, as plaintiffs in the judgment, from enforcing the same. To this bill an answer has been filed, and the defendants now move a dissolution of the injunction on two grounds.

First: That the equity of the bill is answered. And, second: That the bill does not make a case entitling the complainant to relief. The complainant's counsel objects to the reading of the answer, and insists it is irregular. The objection, I consider, is well taken.

The answer purports to be that of Augustus F. Johnson and Samuel Cavalier, administrators, &c., of Charles Cavalier. It is signed by solicitor and counsel, as solicitor and counsel of the defendants, but is sworn to by Samuel Cavalier only. It is not what it purports to be. It is not the answer of the defendants, but of one of them only, and as

it stands now on the files, it cannot, without the consent of the opposite party, be read as the answer even of the defendant who has sworn to it.

In *Harris v. James*, 3 *Bro. C. C.*, 400, on motion made by counsel of the defendants, that an answer of five defendants, sworn to by three only, might be filed as the answer of the three, the Lord Chancellor refused the motion.

In *Done v. Read*, 2 *Ves. & Beams Rep.* 310, on a motion made by counsel to strike out the names of two defendants, in an answer, who had not sworn to it, it was suggested by Mr. Hart (as *Amicus curiæ*) that the course was, that the answer should be received as the answer of those who had sworn to it. The Vice-Chancellor did not adopt the suggestion, but the plaintiff's counsel consenting to the motion, an order was made accordingly.

In *Cooke v. Westall*, 1 *Mad. Rep.* 149, an answer, stated to be the joint and several answers of two, but sworn to only by one, was ordered to be taken off the file, with costs. (See also the case of *The Fulton Bank v. Beach et al.*, 2 *Paige*, 307, and same case on appeal 6 *Wen. Rep.* 36.)

The answer is irregular, and cannot be read on this motion.

But the defendants insist, that by his bill, the complainant is not entitled to any relief at the hands of this court.

The case made by the bill is this. Prior to the year 1843, Cavalier, the complainant's intestate, gave his promissory note to Obadiah Huntley for about the sum of two hundred and sixty dollars. Huntley indorsed the note, and passed it to one John Endicott. Endicott sued the indorser, Huntley, and having recovered judgment upon the note, issued execution and raised the amount due thereon. Subsequently, in the year 1835, Charles Cavalier, the drawer of the note, recovered against the complainant, in the inferior court of common Pleas of the county of Gloucester, a judgment for the sum of one hundred and twenty-five dollars, or thereabouts. The complainant is the son-in-law of Obadiah Huntley.

The bill alleges, that after Cavalier had recovered this

judgment, he threatened to collect the same by execution, unless the complainant would get his father-in-law, Huntley, to take the judgment in satisfaction, or part satisfaction, of the said promissory note, which Huntley, as indorser, had paid to Endicott, and then held against Cavalier; that the complainant not being able to pay the judgment against him, applied to Huntley for assistance, and told him what arrangement could be made with Cavalier; that Huntley's father-in-law agreed to take the said judgment in satisfaction as far as it would go, and promised to see Cavalier and settle the matter; that afterwards, Cavalier told the complainant that he, Cavalier, had seen Huntley, and that the arrangement was made for Huntley to take up the judgment. The bill alleges that this arrangement was carried out by the complainant afterwards paying the amount of the judgment to Huntley; that the matter was by all parties considered as arranged, and no steps were taken by any one inconsistent with such understanding and arrangement until some ten years after the death of Cavalier, when the defendants commenced their suit at law upon the judgment in favor of Cavalier against the complainant; that all these facts and circumstances were known to the defendants, and that they treated the said judgment as satisfied until they commenced their suit; that when the suit at law between the parties came on for trial, and the plaintiffs therein had rested their case upon the production of the record of the judgment, the complainants counsel opened their defence, and insisted upon these facts under their plea of payment; that the plaintiffs, by their counsel, thereupon objected to the evidence, insisting, it was not competent under the issue joined in the cause; that the court overruled the objection, and admitted the evidence; that Huntley was called as a witness and proved the facts as hereinbefore stated, but that in addition thereto, he testified that Endicott recovered a judgment, not only against Huntley, the endorser, but likewise against Cavalier, the drawer of the note; that thereupon, the court decided, that this evidence having established a subsisting judgment against Cavalier, it did not constitute

an available defence in a court of law, and overruled the evidence; that the complainant, having no other defence, the cause was submitted, and the jury found a verdict for the plaintiffs. The bill avers, that at the time of the trial, and until some time after the close of the term at which the trial was had, the complainant did not doubt that there was such judgment against Cavalier, but that he has lately been informed by Endicott that no such judgment was recovered by him, and that upon searching the records, the complainant is satisfied no such judgment was recovered. To the bill is annexed the affidavit of Huntley, stating, among other things, that he has no doubt he was mistaken in testifying that the said Endicott, before sueing him, the said Huntley, as endorser, had sued the said Cavalier as maker of the said note. Upon these facts the complainant prays, that the defendants may be enjoined from all further proceedings at law to enforce the said judgment.

If this statement of facts is true, it is very plain, that the defendants ought not to enforce the judgment in favor of their intestate against the complainant. But this may be so, and yet this Court have no right to interfere with the judgment at law, which the defendants have recovered against the complainant. The defendants instituted proceedings at law upon the judgment, as they had a perfect right to do. The complainant saw fit to meet the case there. A trial has been had by a jury, and upon their verdict the Court has rendered judgment against the complainants. Nor is it sufficient to show that injustice has been done in the trial at law, to entitle the party to the interference of the Court. In *Bateman v. Willoe*, 1 *Sch. & Lefr.* 204, Lord Redesdale says: "It is not sufficient to show that injustice has been done, but that it has been done under circumstances which authorize the Court to interfere, because if a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again.

This court cannot grant the party relief, on the ground that the court at law erred in overruling the evidence. An

interference on such grounds would convert the Court
Chancery into a Court of Errors, and would be an assumptic
of jurisdiction which does not belong to the court. If tl
defence is equally available at law, as in equity, and tl
party has had an opportunity of making the defence at la
a court of equity has no jurisdiction to relieve against tl
judgment, unless some special ground for relief can be e
tablished, other than that of an error in law committed l
the court which had jurisdiction of the case. 2 *Mylne*
Keene, 423, *Harrison v. Nettleship & Fuller.*

In this case the bill alleges that the Court, on the tri
decided that the defence was a good one and permitted it
be made, but that the witness by whom the facts constituti
the defence were proved, testified to an additional fact whi
destroyed the defence, and lead the court to overrule all t
evidence offered to sustain it. That additional fact was thi
that there was a subsisting judgment in favor of Endic
against Cavalier. The complainant alleges, that since t
trial, he has discovered that his witness was in error, a
that there was no such judgment. The complainant h
become involved in his present difficulty then, by his witn
swearing to what was not true—not corruptly—but und
some mistake. For this court to interfere with a judgme
at law, solely because the principal witness was mistaken
to facts, and was subsequently found to be in error, would
a very doubtful and a very dangerous ground for this cou
to interfere with the judgment. As a general rule, this cou
will not interfere with a judgment of a court of law, on t
ground that a witness was mistaken as to a fact upon whi
the defence turned, or that he swore corruptly. I say, a
general rule, for there may be some peculiarity attendi
such a case which will justify the interference of the cou
But there must be some peculiar circumstances, and not
ordinary occurrence, to render such interference proper.

Admitting that in this case the court was right in its
cision, that the witness having testified to a subsisting ju
ment in favor of Endicott against Cavalier, the defence w
not available in law, how does the complainant stand bef

the court? The complainant admits that he went to trial under the impression that there was such judgment. But if this was the fact, which rendered his defence unavailable at law, he was guilty of gross laches in not searching the records, and ascertaining with certainty whether such a judgment existed. It appears, then, from the complainant's own statement of his case, that he has been deprived of his defence, solely in consequence of his own negligence. Relief will not be granted when the party has been deprived of his defence in any manner, through his own neglect or laches.

I must admit, I cannot see how the fact of the witness testifying that there was a subsisting judgment in favor of Endicott against Cavalier, could have affected the defence. In the first place, if it was a fact so material as to deprive the party of his defence at law, it being a matter of record, it should have been proved by the record. But suppose it had been so proved, was it not perfectly competent for Huntley to show, that the judgment had been satisfied?

The judgment against Huntley was against him as indorser. Had there been a judgment against Cavalier it would have been against him as the drawer of the note. When Huntley paid off the judgment against him, the judgment against Cavalier for the same debt, could not have been enforced.

If the complainant correctly states his case, his defence, whether there was a judgment against Cavalier or not, was equally available in law as equity, and the court, when the trial was had, was as competent to grant him relief on that trial, as this court could be in a case instituted here upon the like facts. If this is so, and the court erred in judgment in overruling the defence, that error I cannot correct.

But the statement of the facts in the bill, taken in connection with the affidavit of Huntley annexed to the bill, leaves it uncertain whether the cause of complaint, alleged by the complainant, really exists.

The bill alleges, that the complainant was deprived of his defence because his witness proved there was a subsisting judgment in favor of Endicott against Cavalier, which the complainant, as well as the witness, has, since the trial, disco-

vered was a mistake. It is upon this ground the complain asks the court to interfere. Huntley, in his affidavit referred states the facts at length, to which he testified at the trial, l he says nothing of having testified to there being a subsisti judgment. All he says in reference to this important p of the case is, " that he has no doubt that he was mistak in testifying that the said John Endicott, before sueing t deponent as endorser, had sued the said Charles Cavalier maker of the aforesaid note. And that this deponent, thou many years under a different impression, is now convinc that no suit was ever brought on that note against the s Cavalier." Now, testifying that a suit was brought, is v different from testifying that a judgment was obtained.

This material variance, between the bill and the affidav involves the complainant's case in a good deal of uncertain and leads me to suppose that there is some misapprehensi as to the action of the court in reference to the eviden The witness does not say, as the bill alleges, that he testifi to there being a subsisting judgment, and explain how came to make such a mistake; and yet the only excuse complainant gives, for invoking the aid of this court, is, t the witness did so swear, and that upon that ground the co overruled the defence.

I cannot interfere with this judgment, unless I can see t the defendant has been deprived of his defence, not throu any error of the court, but by some circumstance not tributable to his negligence, or by some fraud practiced his adversary, and against which this court only can gr him relief. If the complainant correctly states his case, was deprived of his defence by the court's allowing p proof of a judgment in favor of Endicott againt Cavali Against such a decision of the court the complainant c obtain no relief here.

I am of opinion that this injunction was improviden granted, and should be dissolved, and that the bill showi no grounds upon which the complainant is entitled to reli should be dismissed with costs.

In the matter of RUNEY DEY, alleged to be a Lunatic.

This court has the power of making a provisional order to protect the lunatic's property, pending the proceedings under the commission. But there is no precedent for converting the petition into a bill in chancery, making a case against third persons, and in this way invoking the action of the court upon matters involving the right of others not parties to the proceedings.

Such practice is condemned.

But the court will not for this reason, nor for defect or informality in the petition, set aside the proceedings, if it appears from them that the supposed lunatic is so indeed, and is entitled to the protection of this court, and he will be benefited by this court's interference.

Although the affidavits accompanying the petition do not come quite up to the requirements of the rule, and practice of the court, the court will not on this account quash an inquisition by which the affidavits themselves were entirely confirmed.

On taking an inquisition unlawful evidence was admitted, on exceptions duly made; declarations not under oath, as to the state of mind of the alleged lunatic. But it appearing that a large number of witnesses had been examined, that the alleged lunatic was before the jury, that the investigation continued for five successive days, and that the defence had been conducted by able counsel: It was *held* that the court would not be justified in interfering with the proceedings, on account of the admission of this testimony, its character not being such as must *necessarily*, or *did probably* influence the jury in their finding.

It is not a good ground for exception, that "the infant children of the petitioner were day by day brought before the jury, and appeals as from them and in their behalf made to said jury, by the counsel having the conduct of the suit or application."

No person can be deprived of the right to manage his own affairs, or of his personal liberty, without the intervention of a jury; and in cases of lunacy, the verdict of the jury is to be founded as in all other cases, upon satisfactory and unexceptionable evidence submitted to their consideration.

A writ *de lunatico inquirendo* was issued to inquire of the lunacy of Runey Dey. By the return it appears, that twenty-three jurors, all that were qualified, sat upon the inquisition, and by their unanimous finding declared Runey Dey a lunatic, and that his lunacy had existed for more than eighteen months prior to their finding.

On behalf of the lunatic, a number of exceptions were filed to the proceedings. Sufficient of the case appears in

the opinion of the Chancellor, to understand the principles involved and settled.

Argued at Trenton, May term, 1852.

Mr. *Lupp*, on behalf of the lunatic, and in support of the exceptions filed, cited 2 *Law Lib.* 655; *Shelford on Lunacy*, 171; *Potts' Forms*, 171; *Saxton*, 19; *Rogers' case*, 1 *Hal. Ch.* 49; 2 *Mad. Rep.* 729; *Tomlinson's case*, 18 *Ves., R. L.* 552, 4 *Johns. Ch. Rep.* 169.

Mr. *Beasley*, contra, cited *Saxton's Ch. Rep.* 25; 2 vol. *L. L.* 81; 1 *Johns. Ch. Rep.* 600, in the matter of *Wendell*, a lunatic.

THE CHANCELLOR. On the petition of Emily Dey, the widow of a deceased son of the alleged lunatic, a writ *de lunatico inquirendo* was issued to inquire of the lunacy of Runey Dey. By the return it appears, that twenty-three jurors, all that were qualified, sat upon the inquisition, and by their unanimous finding, declared Runey Dey a lunatic, and that his lunacy had existed for more than eighteen months prior to their finding. The alleged lunatic has, by his counsel, filed several exceptions to the proceedings. I will examine them in their order.

The first exception is, "For that the said petition is multifarious, and in the article of alleged lunacy is not sufficiently sustained by the affidavits thereto annexed."

The petition contains a prayer for an injunction against Richard Conover, to enjoin him from cutting down, selling, and removing, wood and timber upon a farm in the possession of the petitioner, and belonging to the alleged lunatic. The facts and circumstances are set forth in the petition as grounds for this application.

That the court has the power of making a provisional order to protect the lunatic's property pending the proceedings under the commission, I have no doubt. (*Wendell's case*, 1 *J. C. R.* 600.) *Shelford* 127, mentions several instances of the kind. In one case, after commission issued, the wife of

the supposed lunatic, and all other persons in whose custody or power the personal estate and effects of the lunatic were, were restrained from selling or disposing of the same. And in another case, where a petition for a commission only had been presented, certain parties were restrained from interfering in any manner with the concerns of the supposed lunatic. And even where a sale under execution of the effects of the lunatic is about to take place, the court will interfere if it is necessary and proper. But I can find no precedent for converting the petition into a bill in chancery, making a case against third persons, and in this way invoking the action of the court upon matters involving the rights of others not parties to the proceedings. I am not willing to approve this practice unless it can be shown, that it has received the deliberate sanction of the court, and on that account should be considered settled.

But ought the court for this reason to set aside these proceedings? If it appears that Runey Dey is a lunatic, and is entitled to the protection of this court, who will be benefited by this court's interference for a defect or informality in the petition? Richard Conover, against whom the injunction was prayed, makes no complaint. If the finding of the jury is correct, the property was propely protected by the court, and the only objection is as to the manner in which that protection was afforded. The petition is in other respects formal, and in conformity to the practice of the court. As to the affidavits accompanying the petition. The affiants state, that for the space of two years last past they have known, and been well acquainted, and frequently discoursed with Runey Dey—that within the space of two years last past, they have, by frequently observing the behaviour, words, and actions of the said Runey Dey, looked upon him to be a person deprived of his understanding and reason, in a very great degree. One of the affiants states that a short time ago, when visiting at his house, he saw him treated and led about like a child, and found him altogether unable to hold any rational conversation.

In the case of *Covenhoven*, *Saxton's Rep.* 19, the affidavits

were not as full as those annexed to this petition, and yet the Chancellor deemed them sufficient, and decided, I think, very properly, that if the affidavits did not come quite up to the requirements of the rule, and practice of the court, he would not quash an inquisition by which the affidavits themselves are entirely confirmed.

The second exception likewise refers to the injunction issued upon the application of the petitioner, and is included in the remarks I have already made.

The third exception is, "that on taking of the said inquisition, unlawful evidence was admitted on exceptions thereto duly made, in that the declarations not under oath of Richard G. Conover, in said petition named, as to the state of mind of said Runey Dey were given in evidence, and also a written notice to quit the aforesaid premises served by said Conover on said petitioner."

The evidence as to the declarations of Richard G. Conover, was clearly illegal. If the court could see that illegal testimony of an important nature was taken before the inquest, and its character such as must necessarily, or did probably influence the jury in their finding, the proceedings ought not to be permitted to stand. In the case before us, the investigation was a thorough and protracted one. A large number of witnesses were examined—the alleged lunatic was before the jury—the investigation continued for five successive days—able counsel conducted the defence, and it is somewhat remarkable that the only evidence admitted to which exception was taken on account of illegality, was that embraced in this exception. I should not feel myself justified in interfering with those proceeding, on account of the admission of this testimony, because I do not consider that its character was such as to influence the jury in the result they reached.

The fourth exception is, that "the infant children of the petitioner were day by day brought before the jury, and appeals as from them and in their behalf made to said jury by the counsel having the conduct of the suit, or application."

It does not appear that any exception was taken to the presence of these children during the investigation, and if this was the most exceptionable matter, on the part of the counsel who conducted the case, in the prosecution of the commission, there certainly cannot be much ground for dissatisfaction on the part of the lunatic as to the manner in which the commission has been executed. No complaint is made as to the conduct of the commissioners, or the jury, and none, other than that referred to, as to that of counsel. The patience and fidelity of the commissioners and jury satisfy me, that no misplaced sympathy for these children, or others, has influenced them to the prejudice of the unfortunate individual whose rights and personal liberty were in a measure committed into their hands.

The fifth, and last exception is, "Because the verdict of said jury was against the weight of testimony submitted to them."

No person can be deprived of the right to manage his own affairs, or of his personal liberty, without the intervention of a jury; and in cases of lunacy, the verdict of the jury is to be founded, as in all other cases, upon satisfactory and unexceptionable evidence submitted to their consideration. I have examined the notes of the evidence taken by the counsel who conducted the case on behalf of the alleged lunatic, and which was agreed by counsel should govern me in my decision upon this exception. In examining this history of the trial, I was struck with the great patience, diligence, and propriety, with which the commissioners executed the trust reposed in them, I must confess the evidence does not make out, in my judgment, a very strong case. And yet I cannot say I am dissatisfied with the conclusion arrived at by the jury. In addition to this evidence which I have had the opportunity of examining, the jury had the alleged lunatic before them. They reached their conclusion without a dissenting voice, and nothing has since transpired tending to call in question the propriety of the inquisition.

I feel it my duty to make a decree confirming the proceedings.

SAMUEL DAVIDSON, JOHN L. BURRT and others *v.* R. H. and J. G. ISHAM.

The machinery of a mill, which adjoined private dwellings in a densely populated part of a city, was driven by a steam engine. The complainants alleged that the lives of those residing in the neighborhood were exposed to the danger of the bursting of the boiler of the steam engine—that the working of the steam engine and machinery shook the adjacent houses, and particularly two of the houses owned *by one of the complainants*—that the business there carried on caused smoke, steam, vapor, and unwholesome stenches, of a nauseous and disgusting character, rendering it uncomfortable to dwell in the vicinity. The defendants denied that their business as carried on was a nuisance, and alleged that the facts upon which the complainants rely had been submitted to the proper tribunal for trying issues of fact, and that the issue had been found in their favor.

Held, that the business being a lawful one, the question of nuisance is a matter of fact to be determined by the evidence. That upon conflicting testimony, this court would not interfere, where the question of fact had been previously submitted to a court of law, whose peculiar province it is to determine questions of law involved in the issue, and to guide and direct the jury to a proper result. That it is not necessary to constitute a nuisance that the smell should be unwholesome, it is enough if it render the enjoyment of life and property uncomfortable.

There is no objection to several complainants uniting in a bill, if the nuisance is *common to all*, but they have no right to make a joint complaint for particular injuries confined to one or two of the complainants, as shaking, &c., the houses owned *by one of the complainants*. They cannot unite their distinct and individual causes of complaint, and by their combination make a case of nuisance which separately would not establish the complaint.

But a bill may be filed by several complainants, where the matter complained of is *prima facie* a *common* nuisance, as a slaughter house in a city.

There may be circumstances where even the noise of a steam engine may become a *private* nuisance, and its use on that account be restrained by the court. But it would seem that the use of a steam engine is not *prima facie* a nuisance, on account of its danger to life from explosion.

The bill was filed to restrain the defendants from carrying on a certain business at Jersey City, alleged to be a nuisance.

An application was made for an injunction, and the Chan

cellor ordered notice of the motion to be given to the defendants.

The defendants answered the bill. Affidavits to a large extent, were taken by both parties and read on the argument of the motion, which was heard at Newark, August 5, 1852.

Mr. *A. Whitehead* for the motion, cited *King v. White*, 1 *Burr.* 333; *Walter v. Steele*, 4 *E. C. L. & E. R.* 15; *Catlin et al.*, 2 *Valentine*, 9 *Paige*, 575; *Rich v. Basterfield*, 61 *E. C. L. Rep.* 255; 2 *Bing. New Cases*, 134; *Rex v. Cross*, 12 *Eng. C. L. Rep.* 226; *Earl of Ripon v. Hobart*, 8 *Con. En. Ch. R.* 331–469.

Chapman and *W. Rutherford* contra, cited *Eden on Inj.* 259; 2 *Story's Eq. Ju.* § 923; *People v. Cunningham*, 1 *Denio*, 524; 3 *Black. Com.* 219; 19 *Johns.* 223; 8 *Cowen*, 146; 17 *Conn.* 372; 10 *Alabama* 63.

THE CHANCELLOR. The complainants, by their bill, allege that they own and occupy dwellings in a densely populated portion of Jersey City; that within a few hundred yards of their residences, there is a five story building, which the defendants are occupying as a mill, ostensibly for the sole purpose of burning and grinding coffee and spices, but in reality, for drying and grinding various kinds of drugs of a nauseous and offensive character, as well as for burning and grinding coffee, peas, various kinds of spices, and other substances. The bill alleges, that the defendants have carried on this business since the month of December last, and charges that the same, as prosecuted, is a nuisance. The machinery of the mill is driven by a steam engine, occupying a small building erected for the purpose, on the rear of the lot where the main building stands—the lot being one hundred feet deep and twenty-five feet in width. The complaint is, that the lives of those residing in the neighborhood are exposed to the danger of the bursting of the boiler of the steam engine—that the working of the steam engine and machinery shakes and jars the adjacent houses, and particu-

larly two of the houses, owned by Charles F. Durant, one of the complainants—that the business there carried on causes dense smoke, steam and vapors, and also smells and stenches of an unwholesome, disgusting, and nauseating character, to arise and proceed from the said premises, corrupting the atmosphere, and rendering it uncomfortable to dwell in the vicinity.

The defendants, by their answer, deny all the allegations in the bill, charged as constituting their mill and machinery a nuisance.

Affidavits to a large extent have been taken on both sides —twenty witnesses have been examined by the complainants, and ten by the defendants.

Whether or not the business, as conducted by the defendants, is a nuisance, is a matter of fact, to be determined by the evidence. The business itself is a lawful one, and the defendants have a right to carry it on where they please, so that they do not endanger life, or render its enjoyment uncomfortable to those who reside in its neighborhood.

The defendants deny that their mill and their business, as carried on there, is a nuisance; and they set up in their answer, that the facts upon which the complainants rely to establish the allegation have been submitted to the proper tribunal for trying issues of fact, and that the issue has been found in their favor.

The bill states the fact, that the business carried on at the mill, by the defendants, is the same as was for several years previous, conducted by Williamson, Mann & Griffith. The defendants, as part of their defence, show that Mr. Durant, one of the complainants, instituted a suit at law in the circuit court of the county of Hudson, against Williamson and his associates, for the purpose of abating this same nuisance of which they now complain against the defendants, as continuing. That cause has been twice tried by a jury, and at both trials, verdicts have been rendered in favor of the defendants in the suit. The cause is still before the court, on the same issue on a motion for a rule to show cause why a new trial should not be ordered. In addition to this fact, it

appears, that after he had commenced the suit at law, Mr. Durant exhibited his bill in this court for an injunction. The injunction was refused by the Chancellor, on the ground that the issue joined at law must first be tried.

Under these circumstances, this court ought not to interfere. Here is a question of fact depending upon the conflicting testimony of witnesses. It has already been submitted to a tribunal, to which this court ought to pay deference, in cases of doubt. It is before a court of law, whose peculiar province it is, to determine questions of law involved in the issue, and to guide and direct the jury to a proper result.

If the complainants' facts, as alleged in the bill, are true, I have no difficulty as to the law applicable to them. In *Rex v. White & Ward*, 1 *Burr.* 337, Lord Mansfield says, "it is not necessary that the smell should be unwholesome, it is enough, if it renders the enjoyment of life and property uncomfortable;" and this rule has, by modern cases, been adopted with much uniformity. *Rich v. Barterfield*, 2 *Carr. & Kirw.* 257; *Walter v. Selfe*, 4 *E. L. & Eq. Rep.* 15.

A man cannot destroy the comfort of another's dwelling, by placing a brick or lime kiln, or distillery, so near to his premises as to annoy him by the smoke and stench. The court has frequently protected a man, in such cases, in the enjoyment of his property, and will enforce the maxim—*sic utere tuo, ut alienum non lædas.*

It was said by the complainants' counsel in argument, that the case pending in the court of law did not fairly present the issue between the parties to this suit—that in consequence of the frame of the pleadings, the most important facts are excluded from the consideration of the jury. If this is made to appear to my satisfaction, I shall feel it my duty to relieve the complainants of any such embarrassment, in having the matter fairly investigated, and will direct an issue for the purpose.

There is a feature in this case which may cause some difficulty. Several complainants have united in this bill. To this there is no objection, if the nuisance is common to all.

For instance, if it is the noxious fumes and smoke proceeding from the manufactory which are the occasion of the grievance, this grievance is a common one. But there is an injury proceeding from the use of the steam engine which affects Mr. Durant and one other of the complainants only. Mr. Durant's two dwelling houses are so connected by intervening walls with the building in which the machinery is worked, as to cause a perceptible jarring of the dwellings, and a rattling of the doors, windows, mantel ornaments, and loose articles of furniture. But this is not a common injury to the complainants. They have no right to make a joint complaint of any injury except one common to all. Can the facts of particular injuries, confined to one or two of the complainants, be taken into the account, in adjudging whether the subject complained of is, or is not, a nuisance?

In the case of *Catlen and others v. Valentine*, 9 *Paige Ch. R.* 575, where the bill was filed by several complainants, the nuisance complained of was a slaughter house. The court, in their decision, went upon the ground, that a slaughter house, in a city, is *prima facie* a nuisance. The nuisance was a common one. It was not necessary to show any particular injury to private property. In this case, the business of the defendants is not *prima facie* a nuisance, though carried on in a densely populated city, unless the proposition can be maintained, that the use of a steam engine is *prima facie* a nuisance, on account of its danger to life from explosion. There may be circumstances where, even the noise of a steam engine may become a *private* nuisance, and its use, on that account, be restrained by the court. The authorities are abundant to sustain the position that an individual cannot erect, in a densely settled portion of a city, or town, occupied by private dwellings, any kind of manufacturing establishment, and so use the machinery and carry on the business, as to render living in the neighborhood uncomfortable, either on account of the noise it occasions, or of its smoke and offensive smells.

Where several complainants unite in a bill of this kind, the injury or grievance complained of, must be common to

all. The several complainants cannot unite their distinct and individual causes of complaint, and by their combination make a case of nuisance, which separately would not establish the complaint.

The injunction is refused, but with liberty for the complainants to apply for an issue, if they see fit, as before intimated.

SAMUEL MULLEN v. EDWARD JENNINGS.

An injunction will be dissolved where the bill shows no necessity for the court's affording the complainant such protection. The power to restrain by injunction is confided exclusively to this court, and should be exercised with caution, and only where there is a necessity for it. An individual ought not to be restrained, by this court, in the exercise of any legal right, unless the ends of justice require it.

The complainant alleged that in pursuance of an agreement between the defendant and himself, the defendant delivered him a deed for a certain property, and that under the deed he entered upon, and continued in, the possession of it; and that the complainant delivered to the defendant a deed for another property, which the defendant accepted and took possession under it; and the ground of complaint was that the property conveyed to the complainant was incumbered to a larger amount than the sum stated by the defendant when the bargain was made, and that the defendant refused to pay a sum which he had agreed to pay in the exchange of properties. The relief asked is that the defendant be decreed to pay the sum agreed upon, with interest, from the time of the exchange of deeds, and to pay off the additional incumbrance. The bill then prayed for an injunction and obtained it, enjoining the defendants from entering the property conveyed to the complainant, and from granting, incumbering, or interfering in any way with it: and further, from exercising any acts of ownership on the same; or from selling or disposing of the property conveyed to him by the complainant, or from granting, bargaining, selling or incumbering it, or in any manner impairing the value of any other property now in the defendant's possession or under his control.

There being no allegation that the defendant was insolvent, or embarrassed, or unable to respond to any amount the court might decree him to pay; or that the complainant had not an adequate remedy on the covenants in the defendant's deed to him. It was *held* that the injunction was too broad, was not necessary to enable the complainant to obtain the relief asked, and must be dissolved.

This cause was heard before the Chancellor, May term, 1852, on motion to dissolve the injunction which had been granted on filing the bill.

P. D. Vroom for complainant.

J. Parker and *Wm. L. Dayton* for defendant.

THE CHANCELLOR. The defendant moves a dissolution of the injunction which was granted on filing the bill, and has read his answer in support of the motion.

There were very important principles of law and equity discussed on the argument, and which perhaps it will be necessary to determine in a final settlement of the case. I can, however, determine the motion now before me without committing myself upon the questions referred to; and I prefer doing so, as the counsel will be afforded a better opportunity of aiding me by their researches and argument in forming my judgment upon the final merits of the case.

Upon the case made by the bill, I do not see the propriety of the injunction.

The complainant's allegation is, that in pursuance of the agreement between defendant and himself, the defendant delivered him a deed for the Mannahawkin tavern property, and that under the deed he entered upon, and continues in the possession of it; and that the complainant delivered to the defendant a deed for the property on the Long Beach, which the defendant accepted, and took possession under it. His ground of complaint is, that the Mannahawkin property, instead of being incumbered for five hundred dollars only, as the defendant alleged, when the bargain was made, is incumbered for sixteen hundred dollars; and that the defendant refuses to pay him fifty dollars, which was a sum he was to pay in the exchange of properties.

The relief he asks is, that the defendant may be decreed to repay him the fifty dollars, and interest, from the time of the exchange of deeds, and also to pay off and discharge the mortgages over and above the five hundred dollars.

He then prays for, and obtains an injunction, enjoining the defendant, his attorneys, &c., to desist and refrain from entering the tavern house and lot for any purpose whatsoever, or from granting, incumbering, or interfering in any way with the said tavern house; and further, from exercising any acts of ownership over the same, or from selling, or disposing of the Long Beach property, or from granting, bargaining, selling, incumbering, or in any way impairing the value of

any other property now in the defendant's possession or under his control, in the mortgages referred to.

What need is there of an injunction to prevent the defendant from entering the tavern house and lot? There is nothing in the bill showing the propriety of such an injunction—no allegation that he has made any attempt, or threats to do so. The complainant has the defendant's deed for the property, and is in possession under it. It is not shown, that at law, he cannot protect his possession under that deed, or why the aid of this court is required to enable him to do so. Why, then, should the extraordinary powers of this court be invoked for the purpose?

Why should the defendant be restrained from selling or incumbering the Long Beach property? According to the bill, he is in possession under the deed of the complainant, and put in possession by the complainant.

All the relief the complainant seeks, is that the defendant may be decreed to pay the complainant the fifty dollars, and clear the Mannahawkin property of the incumbrance over five hundred dollars. If he obtains his relief, it does not, in any way, affect the Long Beach property. It is true, by enjoining the defendant from selling or incumbering this property, may better enable him to pay to the complainant such amount as may be required, if such shall be the decree, to pay off the incumbrances on the Mannahawkin property. If the injunction can be allowed for such a purpose, it might with equal propriety restrain him from selling all his property, both real and personal. The bill is not filed with the view of annulling the contract, and compelling the defendant to re-convey this property. There is no allegation that the defendant is insolvent, or embarrassed, or unable to respond to any amount this court may decree him to pay; or that the complainant has not an adequate remedy in the covenants in the defendant's deed to him.

It was rather conceded on the argument, that the injunction was too broad, but the propriety of protecting the complainant in the possession of the Mannahawkin property was urged.

As I have stated, the bill shows no necessity for the court's affording him such protection.

It is true such injunction might do no harm. But this is a power which, by law, is confided exclusively to this court, and should be exercised with caution, and only where there is necessity for it. An individual ought not to be restrained by this court, in the exercise of any legal right, unless the ends of justice require it.

The injunction must be dissolved; the costs to abide the event of the suit.

GEORGE CORNELIUS and CHRISTIAN D. EMSON, complainants, *v.* JOHN POST and SAMUEL REED, defendants.

The power of injunction committed to this court is a delicate and a most important power, and should always be exercised with caution to prevent—not to do mischief; to protect and sustain, not to render the enjoyment of rights and property uncertain; to put an end to, not to encourage litigation.

This court has the power and will interpose, *not to stay a mere trespass*, which can be redressed at law, but to prevent the *destruction of the inheritance*; and it will do this though the title is in dispute, and even where the possession is in dispute, as is frequently the case as to extensive tracts of unimproved lands.

The case of *West v. Walker* commented on and approved.

Where the bill stated, that in May last the defendants commenced cutting; and that the complainants "believe" that the defendants had threatened and intend to cut down, and take away "very large quantities of the wood," &c., it was *held* that the extent of the injury done, and threatened, was not so stated that the court could judge whether the mischief was such as to require and justify its interference—and that the court would have dissolved an injunction under such circumstances, without putting the defendant to the expense of an answer.

Where the title of both parties to a tract of unenclosed land in dispute, (both claiming the title, and both the possession,) had been spread upon the record, it was held, that, while this court would not undertake to decide which title should prevail at law, there might be manifest propriety in declaring one of them of such a character as to render it unwise for this court to exert its extraordinary powers in prohibiting the exercise of acts of ownership under it.

So where the defendants answered that those claiming under the adverse title had controverted both at law and in equity, in various ways, the title of the defendants; that the dispute had been a fruitful source of law suits for fifteen years, and that the defendants have always maintained their title so far as was necessary for their success in any controversy; the defendants showed a title and possession under it of such a character, as would not justify the court in enjoining them from acts of ownership under it.

The rule as to the effect of new matter in an answer on a motion to dissolve is, that where the answer *admits the equity of the bill*, but sets up new matter for defence, on which alone the defendant relies for dissolution, the injunction will be continued to the hearing.

This cause was heard before the Chancellor at Trenton, July 3d, 1852, on motion to dissolve the injunction, which had been granted on an order of one of the masters.

The bill alleged that the complainants are now, and have been since the second day of July, 1849, the owners and possessors of an estate of inheritance in fee simple in a certain tract of land covered with pine wood, situate in the county of Monmouth, containing thirteen hundred and ninety-two acres and four-hundredths of an acre of land. They claim title under and by virtue of a warrant from the Council of Proprietors of East New Jersey; and allege that the said tract is valuable chiefly on account of the wood and timber, and is unenclosed.

They complained that the defendant, under some pretended survey under the West Jersey Proprietors, in May last, entered upon the tract, and commenced to cut down the timber and wood, preparatory to taking the same to market, and that they threaten and intend to cut down, and take away large quantities of wood and timber growing on the said tract. The bill further states, that the complainants have commenced an action of trespass against the defendants, and that they are informed and believe, that the defendants are persons of but little property, and will be unable to respond in damages for the injury.

The defendants, in their answer, claimed title under the Council of Proprietors of West Jersey, and also by possession under that title for more than forty years.

Messrs. *Stratton* and *Tenyck* for motion, cited 1 *Johns. Ch. Rep.* 317, *Stevens v. Beekman;* 4 *Ib.* 21, *Storn v. Mann;* 7 *Ib.* 317, *Jerome v. Ross;* 2 *Green's Ch. Rep.* 279, *West v. Walker;* 3 *Ib.* 177, *Shreeve v. Black;* 3 *Ib.* 449, *Kerlin v. West.*

Messrs. *Vredenburgh* and *Vroom* contra.

THE CHANCELLOR. The complainants obtained an injunction, on an order of one of the masters, restraining the defendants from cutting timber on a tract of land covered with pine wood, situate in the county of Monmouth, and containing thirteen hundred and ninety-two acres and four-hun-

dredths of an acre of land. The complainants allege, that they "are now and have been since the second day of July, 1849, the owners and possessors of and in an absolute and indefeasible estate of inheritance in fee simple" in the said tract—that they claim title under and by virtue of a warrant from the Council of Proprietors of East New Jersey, to lay out and survey for Samuel C. Newell, Thomas De Bow and Francis W. Brinley, or the survivors of them, ten thousand acres in any part unappropriated in the county of Monmouth, dated the 20th May, 1835, under which was returned, on the 27th August, 1835, to said Newell, De Bow and Brinley, among other lands, the tract in question—that by sundry mesne conveyances, under this location and survey, the complainants claim their title—that the said tract is wood land, chiefly of pine, and that the soil being of very little value, the tract is valuable chiefly on account of the wood and timber, and is unenclosed.

The trespass complained of, is, that the defendants, under some pretended survey under the West Jersey Proprietors in May last, entered upon the tract, and commenced to cut down and coal the timber and wood preparatory to taking the same to market, and that they threaten and intend to cut down, coal, and take away very large quantities of wood and timber growing on the said tract.

The bill states, that the complainants have commenced an action of trespass against the defendants, and that they are informed and believe, that the said defendants are persons of but little property, and will be unable to respond in damages for the injury.

That this court has the power to interfere and prevent the destruction of property, by stripping it of buildings, wood or of any thing else constituting its principal value, I have no doubt.

The conflict, in the numerous cases upon the subject, is not as to the right of the court to exercise its powers in cases of alleged trespass or waste, but the circumstances under which its jurisdiction should be exercised. The cases all agree that if the injury is irreparable, or if it amounts to a destruc

tion of the principal value of the property, and the circumstances of the wrong-doer are such that he cannot respond for the injury he is committing, then the court ought to interfere, as a general rule, to prevent irreparable mischief.

The principles laid down by the Chancellor, in the case of *West v. Walker*, 2 *Green's Ch. Rep.* 280, do not, I think, conflict with this view as to the proper exercise of the restraining power of the court. The Chancellor approves and adheres to the general principle, that the court cannot interfere in a naked trespass, where there is a full remedy at law, and that there must be something particular in the case, so as to bring it under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy. He decided that case, not on the ground, as was insisted by the counsel of the defendants in this case, that this court will not protect the extensive tracts of unenclosed pine wood land from depredation and total destruction; for he expressly says, "I do not discover in it (the case) any of those peculiar circumstances which will justify me in taking it out of the general rule."

The court has the power, and will interpose, not to stay a mere trespass which can be redressed at law, but to prevent the destruction of the inheritance; and it will do this though the title is in dispute, and even where the *possession* is in dispute, as is frequently the case as to the extensive tracts of unimproved lands.

But every case must be judged by its own circumstances. The discretion of the Chancellor is appealed to. The power of injunction committed to this court is a delicate, and a most important power, and should always be exercised with caution—to prevent, not to do mischief—to protect and sustain, not to render the enjoyment of rights and property uncertain—to put an end to, not to encourage litigation.

With the case before me, I have no difficulty. The injunction ought not to have been granted. There is not a circumstance stated in the bill which takes it out of the case of an ordinary trespass.



How is the injury already committed, or threatened, charged in the bill?

It is alleged, that in May last, the defendants commenced cutting. What quantity have they cut? what injury have they done? And again: they threaten and intend, as the complainants *believe*, to cut down, coal, and take away *very large quantities* of the wood and timber. The complainants "believe" they have made these threats, not that such declarations were made by them to the complainant. And then those "threats" were to cut "very large quantities of the wood," not to strip the whole, or any large portion of the land, of the wood which constitutes its value. One hundred cords may, in the estimation of the complainants, be a very large quantity. But the extent of the injury done, and threatened, must be so stated, that the court may judge whether the mischief is such as requires and justifies its interference.

I should have dissolved this injunction without any hesitation, upon an application for the purpose, without putting the defendants to the expense of an answer.

But the defendants have answered the bill, and I deem it proper to notice the answer for the reason that this same title to the tract of land in controversy has been before this court several times; and my view of the case, as the pleadings now before me present it, may prevent any further appeal to this tribunal.

The defendants, in their answer, claim title under the Council of Proprietors of West Jersey, and also by possession under that title for more than forty years.

From the mere fact of their setting up title in themselves and possession of the tract of land in dispute, I would not dissolve the injunction. In a tract of unenclosed land like this, both may claim the title, and both the possession, the possession being very equivocal and established by occasional acts of ownership only.

Nor would I undertake to decide in whom the legal title is. But where the title of both parties is before me; each

party undertaking to spread upon the record their respective titles; while I ought not to undertake to decide which title should prevail at law, there may be manifest propriety in my declaring one of them of such a character, as to render it unwise for this court to exert its extraordinary powers in prohibiting the exercise of acts of ownership under it.

In this case, the title of the complainants is under the West Jersey Proprietors. The warrant was issued in 1835; and the survey and location made, part in 1835 and part in 1840. The complainants purchased in 1849. The location was made in a range of land which has been for many years a subject of dispute, and of numberless law suits in the courts of New Jersey. The validity of the title depends upon the question as to where is the true division line between East and West New Jersey.

The complainants, or those under whom they claim, it is not alleged, have ever exercised any acts of ownership, or possession in any way.

The defendants' title is under the West Jersey Proprietors. The survey and return were made to William Griffith, Esq., in 1809, and the land in question is included in this survey, known by the name of the Griffith survey. The complainants allege, that Mr. Griffith, and those claiming under him, have, under this title, exercised acts of ownership over the land—have sold and cut off large quantities of timber—that under one of the owners upwards of five hundred acres were cut off, and that the title was not disputed until the location was made under the East Jersey Proprietors, in 1835. The defendants show, that those claiming under this adverse title, have controverted, both at law, and in this court, in various ways, the title of the defendants—that this dispute has been a fruitful source of law suits for fifteen years, and that the defendants have always maintained their title so far as was necessary for their success in every controversy. It appears that abundant opportunity has been afforded, if not to these complainants, to those under whom they claim, of establishing their title at law.

I think the defendants show a title, and possession under

it, of such a character, as will not justify the court in enjoining them from acts of ownership under it.

The defendants, by their answer, further show, that in 1835 and 1836, Cornelius, one of the complainants, cut a large quantity of wood and timber on the Griffith survey—that he subsequently admitted that he had trespassed on the land of Samuel I. Reed, under whom the defendants held—that an arbitration was had between the parties, not as to the title, but as to the amount of damages, which resulted in an award in favor of Reed, of upwards of six hundred dollars, and which sum Cornelius paid.

The complainants' counsel insisted, that most of these facts constituted new matter, which should not be relied upon by the court, on a motion to dissolve.

The rule as to the effect of new matter in an answer on a motion to dissolve is not as bad as stated by the counsel. The rule is, that when the answer *admits the equity of the bill*, but sets up new matter for defence, on which alone the defendant relies for dissolution, the injunction will be continued to the hearing.

But most, if not all, of the matters I have referred to in the answer in this case, may, I think, be fairly considered as responsive to the bill. The bill charges, that the defendants entered upon the land under a pretented survey from the West Jersey Proprietors. It was proper, then, that the defendants should set forth their title, and possession under it, and all the facts and circumstances going to show how that possession was asserted, maintained, and in what manner, if at all, recognized and acknowledged by the complainants. Let the injunction be dissolved, and the bill be dismissed with costs.

JOSEPH E. WEST v. THOMAS PAIGE.

The mere filing of a replication is not a compliance with a rule to speed the cause.

In the absence of any established practice or rule in our own court to the contrary, we follow the English practice, in all cases where such practice is not rendered inapplicable, by some statutory provision, or does not violate the spirit of our statutory regulations.

The statutory provision which requires that every cause shall be set down for hearing at the next stated term after the filing of the replication, renders the English practice in this case inapplicable.

Where on the 20th May, the defendant took an order on the complainant to speed his cause, and the order was served on the day following, and on the 22d the complainant filed his replication, and took no further step in the cause. It was *held* that the defendant was entitled to have the bill dismissed at the next stated term; because the complainant had not, in compliance with the statute, brought his cause to a hearing at that term.

This was a matter of practice, which was heard at the October term, on motion to dismiss the bill.

Mr. *Browning* for motion.

W. Halsted contra.

THE CHANCELLOR. On the twentieth of May last past, the defendant took an order on the complainant to speed his cause. The order was served on the day following, and on the twenty-second day of May, the day after service, the complainant filed his replication.

On behalf of the defendants, it is now moved to dismiss the bill, on the ground, that the mere filing of a replication is not a compliance with the rule to speed the cause.

It was said, on the argument, that Chancellor Pennington decided, that the filing of a replication, without taking any further step in the cause, was not a compliance with the rule.

This is stated from mere recollection, and no record is

referred to of such a decision. I think, however, such a decision, if made, was upon correct principles.

In the absence of any established practice or rule in our own court to the contrary, we follow the English practice, in all cases where such practice is not rendered inapplicable by some statutory provision, or does not violate the spirit of our statutory regulations.

The statute regulating the practice of this court, (*R. S.* page 912, sec. 45,) renders the English practice, to the point in controversy, inapplicable.

The statute referred to, entitles the defendant to have this bill dismissed, because the complainant has not, in compliance with that statute, brought his cause to a hearing at the present term of the court.

The court may, on just cause and reasonable terms, allow further time for the hearing; and I am willing now to hear such application, if the complainant's counsel desires to make it.

JACKSON & MCGINNIS *v.* THE RECEIVERS OF THE PEOPLE'S BANK OF PATERSON.

The language of the seventeenth section of the act to prevent frauds by incorporated companies, (*R. S.* 135,) giving the right of appeal to any person or persons who should think himself or themselves aggrieved by the proceedings of the receivers appointed under the act, is very comprehensive, and would seem to have been adopted, for the purpose of embracing every question which could possibly be brought before the receivers for their action.

And the right of appeal is not confined to a creditor who has a naked claim against the company, but extends to questions where a set-off is involved.

So where parties applying to receivers appointed by this court for a settlement of their accounts with a bank, admitted that the bank held their promissory note, but claimed a set-off, and insisted that the bank was largely indebted to them for interest money, commissions, &c., and the receivers decided upon the accounts of the respective parties, and refused to allow the set-off. It was *held* that they were "*parties aggrieved*" by the determination of the receivers, and they could not be denied the right of appeal given them by the statute.

The appellant, in his petition of appeal, should state his case fully, and the particulars in which he is aggrieved. By the answer of the receivers, the issue will be formally made between the parties. If the facts are controverted, proof can be taken in the ordinary way.

The practice of the court settled in like cases, until otherwise ordered.

This was a matter of appeal from receivers. It was heard at October term, 1852, on motion to dismiss the appeal.

A. Whitehead moved to dismiss the appeal, on the ground that it was a matter from which an appeal would not lie, and relied upon the statute, (*R. S.*, 129, secs. 11, 12, 13, 15, 17.)

P. D. Vroom contra, cited *Suydam v. M. Bank of N. B.*, 2 *Green's Ch. R.* 114; *same case*, 277; *Runyon v. Farmers' and Mechanics' Bank of New Brunswick*, 481.

THE CHANCELLOR. On the argument of this motion, I intimated, as my impression, that this was a case not con-

templated by the statute which gives an appeal from the receivers to the Chancellor. But on examination of the different sections of the act, I am satisfied that this appeal will lie; and that the cases of *Suydam v. The F. and M. B. of N. B.* and *Runyon v. Same Bank*, are authorities to sustain this appeal.

The language of the seventeenth section of the act is very comprehensive, and would seem to have been adopted, for the purpose of embracing every question which could possibly be brought before the receivers for their action, and by which action any person could complain of being aggrieved. The section referred to, gives the right of appeal to any person or persons whatever, who should think themselves or himself aggrieved by the *proceedings* or *determination* of the said receiver or receivers, or trustees, in the discharge of their duty; and the Chancellor is to hear and determine the matter complained of in a summary way, and make such order touching the same, as shall be equitable and just.

The counsel for the receivers insists, that this right of appeal is confined to the proceedings, and determination of the receivers, in reference to a creditor who has a naked claim against the company, and presents it for a dividend, or other cause, where a person claims to be a creditor of the company, and to come in for a dividend of its assets, for a balance alleged to be due him, and it is necessary, in order to ascertain the amount due, and entitle the creditor to come in for a dividend, that the dealings and transactions between him and the company should be adjusted by the receivers. That these matters being necessarily submitted to the determination of the receivers, and their determination binding, an appeal lies to the Chancellor, and in no other cases.

The receivers insist that it appears by the appeal that the claim of Jackson & McGinnis is not presented for a dividend, but only in diminution of a larger demand held by the receivers against them, against which they require the receivers to allow and set-off their demand.

That where the question of a set-off is involved, and as

in this very case, the receivers claiming that there is a large amount due from the claimant to the bank, and denying altogether the legality of the claims he presents—or in any other case, where the receivers hold a promissory note, or any other evidence, or claim of debt, against an individual, no appeal can be taken from their decision disallowing such set-off or claim.

The argument is, that in the case of a naked creditor, the decision of the receivers is conclusive upon the rights of the parties—the creditor having no right to institute a suit at law against the receivers, he has no redress, but by appeal to the Chancellor, while in the case of a debtor, their decision has no binding efficacy—they cannot enforce their decision, but must prosecute the debtor upon the original contract. The argument only proves that the debtor may possibly have some advantage in this respect.

In this case, Jackson & McGinnis appealed to the receivers for a settlement of their accounts with the bank. They admit, the bank holds their promissory note—they claim a set-off, and insist, the bank is largely their debtor for interest money and commissions; and they further present for allowance the bills of the bank to a large amount. The receivers decide upon the accounts of the respective parties, and they refuse to allow the set-off; and their determination is, that they will prosecute Jackson & McGinnis, and put them to establishing their counter claims in a suit at law. Are they not, in the very terms of the statute, "*parties aggrieved*" by this determination of the receivers? Is it any sound reason, that they should be denied the right of appeal given them by the statute, because they may, notwithstanding the decision of the receivers is adverse to their claims, set them up in a suit at law?

Jackson & McGinnis, by this appeal, have submitted to the jurisdiction of the Chancellor under the statute, and the Chancellor, being vested by the act, in the execution of the powers and authority conferred by it, with all the jurisdiction and power which is lawful for the Court of Chancery to exercise in suits depending in the court, will so mould the

proceedings, as to make the decision binding and conclusive on the parties, except so far as that decision may be subject to an appeal to a higher tribunal. In the same section which gives this right of appeal, it is declared, that "all cases brought before the Chancellor under this act, shall be considered as depending in the Court of Chancery, and the orders and decisions carried into effect, the same as in other causes of equity jurisdiction."

It was further suggested on the argument, that there were great embarrassments in conducting the proceedings of an appeal, in a case like this—that there are no proceedings, or determination of the receivers recorded, or reduced to writing, and consequently nothing to be sent up to the Chancellor as the foundation for any further proceedings. But as this whole matter is under the control of the Chancellor, there can be no difficulty in adopting such proceedings as may be requisite to answer the ends of justice, and the object of the statute.

The appellant, in his petition of appeal, should state his case fully, and the particulars in which he is aggrieved. By the answer of the receivers to the petition, the issue will be formally made between the parties. If there is no dispute as to the facts, the case will be decided upon these pleadings. If the facts are controverted, proof can be taken in the ordinary way, and the matter be brought to a hearing and final determination according to the usual practice in similar cases. It is one of those cases where the court will provide for the difficulties as they arise. The object of the statute will be attained, by disposing in a summary way, and with as little expense as possible, of all controversies which may retard the final settlement of the affairs of the insolvent institution.

As this is a new case, let the appellants amend their petition of appeal, if it be necessary, so that their whole case be fully presented—let a copy of the petition be served on the receivers, with an order to answer in twenty days—and let the petitioners bring the appeal to a final hearing within

thirty days after answer, and on giving eight days notice; and on failure of the petitioners bringing the appeal to hearing, the receivers are at liberty to have the appeal dismissed, or to notice the same for hearing, at their option. Let this be considered as the practice of the court in like cases, until otherwise ordered.

ANDREW S. GARR *v.* SELAH HILL *et al.*

J. entered into a verbal agreement with M. that M. would convey to J., on the first of August, 1839, two lots of land for a consideration specified. On delivery of the deed, J. should pay a specified portion of the consideration money, and give a bond and mortgage for the residue, payable in five years; or, provided, that by a day specified, J. should put improvements on the two lots, to the value of the cash payment specified, then M. agreed to take a bond and mortgage for the whole purchase money. J. entered under the agreement, went into possession, and commenced building. No conveyance was made to him under the agreement.

Subsequently J. entered into an agreement under seal, which bears date the twenty-ninth day of August, 1839, in which, after reciting the verbal agreement above, J. agrees, for a consideration specified, to convey to W. all his right, title, and interest in the said lots of land, and further agrees to discharge M. from all liability under his contract, provided M. would convey the said premises to W. upon the same terms he was to convey to J.

On the thirteenth day of September an attachment was issued against M. as an absent and absconding debtor; under this attachment the sheriff attached the lots mentioned, *and all the right, title, and interest of J. in the same.*

On the twelfth of October, M. conveyed the lots to W. W. executed a mortgage to M., and entered. This mortgage was foreclosed. M. was the purchaser, and on the twentieth of November, 1841, the sheriff executed to him a deed.

On the eleventh of December M. conveyed to one of the defendants, H. H. went into possession, finished the buildings, and put considerable improvements on the lots.

On the twenty-ninth of July, 1843, nearly four years after the attachment was levied, the auditors made sale under the attachment, and conveyed to the complainants the interest of J. in the lots and improvements.

The bill prays that the lien of J. be established, and the complainant be decreed entitled to the property by virtue of his purchase.

Held—that the agreement of the twenty-ninth of August was a legal transfer of all J.'s interest in the land, and M,'s consent was not necessary to make the transfer of J.'s interest complete. The agreement between J. and W. was complete and executed.

If J. had any interest *subject to attachment*, he had an interest he could part with without M.'s consent, and the *attachment subsequently issued and levied*, created no lien upon the land.

If a debtor is about to abscond from his creditors, and with this knowledge on the part of the purchaser, and with the view of aiding him to convert his property into funds, so that he may the more readily effect his purpose, he takes a conveyance of the debtor's property, *he participates in the fraud* the debtor contemplates perpetrating, and such conveyance *is void as against creditors.*

But a debtor in failing circumstances, or about to abscond, may legally make a conveyance for the purpose of preferring *an honest creditor.*

Bill filed September eighth, 1843. The cause was heard upon bill, answer, replication, and proofs.

The material facts disclosed by the pleadings and evidence, are contained in the Chancellor's opinion.

S. R. Hamilton and *W. Halsted* for complainant.

P. Bentley and *P. D. Vroom* for defendants.

THE CHANCELLOR. In the early part of 1839, Alfred F. James, then of Jersey City, in the county of Hudson, made a verbal agreement with the agent of Neal McLeod, of the city of New York, to this effect: That McLeod, on the first of August, 1839, would convey, by deed of warranty, to James, two lots of land in Jersey City, for the consideration of eight hundred dollars, for one lot, and one thousand dollars for the other. On delivery of the deed James should pay two hundred dollars on each lot, and give a bond and mortgage for the residue of the consideration money, payable in five years from the date thereof, with interest payable on the first day of May, in every year; or, provided, by the said first of August, the said James put improvements, by building, on the two lots, to the value of two hundred dollars on each, McLeod agreed to take a bond and mortgage for the whole purchase money, one thousand eight hundred dollars, payable on like terms. James, under this agreement, went into the possession of the lots, and commenced building dwelling houses upon them, but of what value, does not appear, though one of the answers denies that they were of the value stipulated in the agreement. No conveyance was made to James under this agreement. On the twenty-ninth of August, 1839, James and David B. Wakeman entered into an agreement, under seal, and which agreement bears date August twenty-ninth, 1839, in which, after reciting the verbal agreement between James and McLeod, James agrees, in consideration of the sum of five hundred dollars, to convey to said Wakeman all his right, title, and interest in the said lots of land, and further agrees to dis-

charge the said McLeod from all liabily under his contract, provided McLeod would convey the said premises to Wakeman upon the same terms and conditions specified and agreed upon in their said verbal agreement.

On the thirteenth day of September, 1839, an attachment was issued out of the Common Pleas of the county of Bergen, against McLeod as an absconding debtor. Under this attachment the sheriff attached this land, and all the estate, right, and interest of Alfred F. James in the same, and the same was inventoried and appraised at four thousand dollars.

On the twelfth day of October, McLeod conveyed the lots in question to Wakeman, and on the twenty-first of the same month, Wakeman and wife executed to McLeod a mortgage to secure Wakeman's bond of one thousand eight hundred dollars. Wakeman entered into possession, and expended several hundred dollars upon the buildings which had been partly erected by James.

In the term of April, 1841, of this court, a foreclosure suit was commenced on the mortgage against Wakeman and wife, as the only defendants. A decree was obtained, and under it the property was sold. McLeod purchased it for the amount of the decree, two thousand one hundred and sixty dollars, and on the twentieth of November, 1841, the sheriff executed and delivered to him a deed.

On the eleventh of December, 1841, McLeod conveyed to one of the defendants, Selah Hill, the consideration expressed in the deed being two thousand and two hundred dollars. Hill went into possession, finished the buildings, and has put considerable improvement on the lots.

On the twenty-ninth of July, 1843, nearly four years after the attachment was levied, the auditors made sale under the attachment, and conveyed to the complainant the interest of James in the lots and improvements, for the sum of forty-one dollars.

The bill prays, that the lien which existed on the said lots in favor of the said James may be established, and the complainant be decreed entitled to the same, by virtue of

his purchase, the complainant submitting to such terms, &c., as the court may direct.

McLeod being deceased, his executors were made parties defendants to the bill, and they and Selah Hill have severally answered. The cause comes up now for final hearing upon the pleadings and proofs.

The complainant has failed to establish the fact that the agreement between James and Wakeman, of the twenty-ninth of August, was antedated. Hill denies fully all knowledge, information, or belief that it is so, and clears his conscience of any participation in a fraud, if any was practiced, in that transaction. The agreement is produced. There is nothing suspicious on the face of it. It is proved to be in the hand-writing of the subscribing witness, B. J. Vancleve, Esq., counsellor at law, since deceased. If it was antedated, the only object must have been to represent the transaction as prior in point of time to the issuing of the attachment, so as to prevent James' interest being affected by a lien in consequence of that proceeding. This is charged, by the bill, to have been the object the parties had in view. But it is proved that Mr. John Cassedy, who was the agent of McLeod, and then residing at Hackensack, received by the hands of Wakeman, a letter addressed by James to Mr. Cassedy, informing him of the agreement with Wakeman. The letter is produced, and bears date the twenty-ninth of August, and Mr. Cassedy's impression is he received it either the day after, or a few days after its date. It appears also in evidence, that on the twenty-ninth of August, James confessed a judgment to Wakeman and his brother, thus showing that on that day they had transactions together in reference to accounts previously existing between them. There is no circumstance proved, from which the inference can fairly be drawn, that the agreement was not executed on the day it bears date.

But it is insisted by the bill, and also by counsel in argument, that even if the said agreement was executed prior to the issuing and serving the attachment, it did not amount to a sale and conveyance *in presenti*, of the right, title and in-

terest of James in the premises, but was merely an executory contract binding James to convey the same, provided McLeod would agree to the substitution of Wakeman in the place of James; and the bill charges that McLeod did not consent to the substitution until after the service of the attachment. It is true, the only evidence as to the time when McLeod first consented to the substitution, was when he executed the deed, which was a short time after the attachment was issued. But McLeod being dead, it was not in the power of the defendants to show when his consent was first given. But I do not consider this material. The agreement of the twenty-ninth of August, was a legal transfer of all James' interest in the land. He sold his interest for the sum of five hundred dollars. There was nothing further for him to do, and no conveyance for him to execute. McLeod's consent was not necessary to make the transfer of James' interest complete. It is true Wakeman might not have been able to compel McLeod to execute to him a deed upon the exact terms stipulated by the agreement; though he might have got the full benefit of it by paying the consideration, if McLeod refused to take his bond and mortgage as a substitute for James'. The agreement between James and Wakeman was complete and executed. Suppose McLeod had refused to execute the agreement with Wakeman, Wakeman could not have recovered the five hundred dollars back again from James. And if James had enforced against McLeod the execution of the agreement, James would have been a trustee for Wakeman. If James had, by virtue of his agreement with McLeod, any interest that was subject to attachment, he had an interest he could part with without McLeod's consent. If, therefore, the agreement was *bona fide*, and for a valuable consideration, the attachment subsequently issued and levied, created no lien upon the land.

But it is further insisted that this agreement is void, because it was made and executed by James on the eve of his absconding from his creditors, in a state of insolvency, and for the purpose and object of putting his interest in the said property out of the reach of his creditors; and the bill

charges, that at the time Wakeman was embarrassed in his circumstances, and unable to pay, and never did pay James the consideration mentioned of five hundred dollars.

If the agreement was made by James for the purpose of defrauding his creditors, and Wakeman entered into the agreement to aid him in such purpose, the agreement is void, no matter whether Wakeman paid him a full consideration or not. A deed executed for the purpose of defeating creditors, in which purpose the grantee participates, is void, even though a full consideration is paid. So, if a debtor is about to abscond from his creditors, and with this knowledge on the part of the purchaser, and with the view of aiding him to convert his property into funds, so that he may the more readily effect his purpose, he takes a conveyance of the debtor's property, he participates in the fraud the debtor contemplates perpetrating, and such conveyance is void as against creditors. (*Sexton v. Wheaton*, 1 *Am. Leading Cases*, 64–65.) A deed must not only be for a full consideration, but it must be *bona fide*, if existing creditors are affected by it. (*Story's Eq.* sec. 369, and cases there cited.) This is very different from a debtor in failing circumstances, or about to abscond, making a conveyance for the purpose of preferring an honest creditor. This he may legally do. (*Story's Eq.* § 370.) The allegation, that Wakeman did not pay any consideration is not proved, or sustained by any circumstance giving the slightest ground for such an inference. The complainant might have made Wakeman a defendant, and have had the benefit of a discovery from him, or he could have used him as a witness. It was not necessary for Selah Hill to sustain his title, except by his denial of any participation in the alleged fraud, even if a fraud in the transaction between James and Hill could affect Hill's title, until the complainant, by some evidence, impeached that transaction. If there was any thing in the fact of James' absconding so soon after his making the agreement with Hill, as to make it necessary for the defendant, Hill, to show that Wakeman was not in embarrassed circumstances, as charged in the bill, and that he did

pay a valuable consideration, which the bill denies the complainant has, by testimony introduced by himself, relieved the defendant of the necessity of making such proof.

Samuel Cassedy, Esq., a witness on the part of the complainant, testifies, that although Wakeman was sued about this time, he had "a good deal of means." "He carried on a good deal of business, and had always considerable means in his hand, and has still." And the complainant recalling his attention to this matter, on a re-examination, he says, "From what I knew of Mr. Wakeman's circumstances, I supposed Mr. Wakeman could pay the sum of five hundred dollars at that time." And in further reply to interrogatoties of complainant, he says, "I don't know what Mr. James made that paper for; I think it is probable that Mr. Wakeman had Mr. James charged with the lumber to build those houses with, and that, together with his liability as bail of Mr. Wakeman for Mr. James, deponent thinks were the inducements to make the paper Exhibit B (which is the agreement) on the part of defendants." With this evidence on the part of the complainant, Hill was entirely relieved from any necessity of proving any thing as to the consideration between Wakeman and James, or the pecuniary circumstances of James at that time.

With this view of the case, it is unnecessary for me to decide other questions discussed on the argument—whether the nature of James' interest in the land was such as is subject to attachment?—whether the attachment in the form it was made, the return being of all his interest in the land, and not in the agreement with McLeod, and the appraisement being of the land, was an attachment of James' interest in the agreement?—or the more important question: whether, if the agreement between James and Wakeman was antedated, and the deed between them made to defeat and defraud creditors, the title of the defendant, Hill, is affected by such fraud under the peculiar circumstances of this case?

There is no peculiar equity in the complainant's case. He was the attorney of the plaintiffs in attachment. He

purchased this property on speculation, with full knowledge of all the facts, and at a mere nominal price.

The defendant is a *bona fide* purchaser, for a full consideration, and without notice of any of the facts and circumstances alleged by the complainant as impugning his title. He exercised all the diligence and care, that the most cautious and prudent man could do in making a purchase. He made inquiry as to matters not on record, to the sources from whence information could be derived, and employed competent counsel to examine the title and prepare the deeds. He has put expensive improvements on the property, and in the most public manner, and without a hint from any one, that his title could be questioned, and this was done in the very neighborhood where the complainant, who was the attorney for the plaintiffs in the attachment, resided.

The bill must be dismissed with costs.

ELIZABETH SCOTT v. PHILIP GAMBLE and WIFE.

The doctrine as laid down by Sir Edward Sugden, in reference to the incapacity of a person, in the exercise of his duty as trustee, becoming the purchaser of the property of his *cestui que trust* has always been recognized as the law in New Jersey.

An executor selling land, in the execution of a trust expressed in a will, either at public or at private sale, or under an order of the court, cannot either directly or through the agency of another, become the purchaser, or interested in the purchase of such sale.

The rule, as recognized by Chancellor Kent, in *Davoue v. Fanning and others*, 2 *Johns. Ch. R.* 252, adopted in the broadest extent.

Where one intermarried with a widow who was the executrix of her late husband, and who had proved and taken upon herself the execution of the will: *Held*, that by his marriage he assumed all the responsibilities which devolved upon his wife as executrix, and the rule as stated above would be applicable to him.

But where it appears that the complainant received the purchase money with a full knowledge of the facts, and deliberately ratified the sale, *with a knowledge of the fact, which would avoid the sale*, it is a bar to any relief which this court might otherwise have afforded.

Where a bill was filed against defendants *as trustees*, and as *the representatives* of a testator, in their *representative characters*, and the prayer of the bill was in conformity thereto, the complainant is entitled to an account in that aspect only.

Bill filed on the seventeenth day of May, 1849. The bill states, that Leonard Scott, late of the city of Trenton, and county of Hunterdon, now county of Mercer, duly made and published his last will and testament in writing, bearing date on the fifth day of September, in the year of our Lord one thousand eight hundred and thirty-six, which was executed and attested as by law is required, for passing real estate by devise, and thereby, after directing all his just debts to be paid, and after giving to his wife Lucretia all his household furniture and three hundred dollars in money, did further devise, as follows, to wit: "I give and devise unto my four children, namely, Leonard M. Scott, Henrietta Ann Scott, Elizabeth Scott, and Amanda Scott, each one lot of land, being part of my lot of land and real estate, situate

in the city of Trenton aforesaid, to be severally laid off agreeably to the annexed plan. That is to say, (1) unto the said Leonard M. Scott in said plan, part called lot No. 1 (one,) fronting one hundred and two feet, more or less, on the east side of Green street, and twenty-three feet on the southerly side of Academy street, and bounded by a lot of Thomas Ryall, lot No. 2 and others, with my dwelling house and other buildings thereon; (2) unto the said Henrietta Ann Scott, lot No. 2 (two,) fronting eighty-eight feet on said Academy street, and extending from thence at right angles thereto, southerly, the same width, by and between said lot No. 1 and lot No. 3 to the rear line, or land of Samuel S. and Thomas J. Stryker and others; (3) unto the said Elizabeth Scott, lot No. 3 (three,) fronting eighty-eight feet on said Academy street, and extending from thence at right angles thereto, the same width, by and between said lot No. 2 and lot No. 4, to the said rear line or land of said Stryker and Philemon Dickinson; and (4) unto the said Amanda Scott, lot No. 4 (four,) fronting eighty-eight feet on said Academy street, and extending from thence at right angles thereto the same width by and between said lot No. 3 and lot No. 5, to said rear line or said land of Strykers and Dickinson, and the African Burying. To have and to hold in severalty as aforesaid, and to their heirs and assigns respectively, forever; but, nevertheless, to be in the use and enjoyment of my said wife, to wit: the said lot No. 1, with the buildings thereon, during her natural life, and to be in lieu of dower in all my real estate, and also the like use of the said lots No. 2, 3 and 4, until my said daughters shall respectively arrive at the age of twenty-one years; but in case any of my said children should depart this life before he, she, or they should attain such age, and without lawful issue, then I give and devise such lot or lots to the survivors or survivor of them, equally to be divided, and to his, her, or their heirs and assigns respectively forever."

"4th. I direct and authorize my executrix herein named, to sell and dispose of, at her discretion, all the residue of my said lot of land and real estate, in said plan called lot

No. 5 (five,) and situate in said city, bounded by said Academy street, Montgomery street, the Friends' Burying Ground, and said lot No. 4, for the best price that may be obtained therefor, and to execute good and sufficient title or titles for the same in fee simple, and the net proceeds of such sale or sales, to put and keep out at interest on real security, free of incumbrance, and the interest thereof I give to my said wife, until my youngest child living shall be of age, and then the principal sum I give to my said wife and four children, or the survivors of them, equally to be divided.

"5th. I give and bequeath unto my said three daughters, Henrietta Ann Scott, Elizabeth Scott and Amanda Scott, the sum of two thousand dollars, meaning the principal sum mentioned in a certain bond which I hold, together with the mortgage securing the payment and interest thereof, and the policy of insurance as assigned to me; and in case the said sum, or any part thereof, should be paid, the same again to be put and kept at interest, on like security, by my executrix; but the interest thereof, always I give to my said wife, until my youngest child living shall attain the age of eighteen years, and the said two thousand dollars to be equally divided amongst my said three daughters, or the survivors of them.

"6th. I give unto my said wife, all the residue of my estate.

"7th. I nominate and appoint my said wife, Lucretia Scott, executrix of this my last will and testament, and in whose care and protection I leave my said children, and I hereby desire and enjoin upon her to educate and support them during their minorities respectively, in a decent and suitable manner, for which purpose it is my intention to provide her the means, as well as for the support of herself, but the same, or any bequest herein given her, to be in no wise subject to the control, support or liabilities of any future husband, (in case she should marry again,) to the prejudice of my said children, but all powers to remain in her, notwithstanding such coverture; and in case of her decease

before my youngest child living shall be of age as aforesaid, then I give all the rents, uses, and interest of my real estate, and money put out, as given to her, unto such person as she may appoint by will or otherwise, or in default thereof, to the oldest of my said daughters living, to be applied to the support and education of my said children in like manner, as herein I have provided and desired my wife to support and educate them, as in and by this said will, reference being thereto had, will more fully and at large appear."

That the said testator, Leonard Scott, departed this life on or about the first day of September, in the year of our Lord one thousand eight hundred and thirty-six, without having revoked or altered his said will, and leaving complainant and Amanda Scott, Henrietta Scott and Leonard Scott, his children, him surviving. And, therefore, the said Lucretia Scott, the executrix of the said will named, duly proved the said will, and undertook the burthen of the execution thereof, and by virtue thereof possessed herself of the personal estate and effects of the said testator, to an amount greatly more than sufficient to pay and satisfy his funeral expenses, just debts, and also entered into the possession of the freehold and leasehold estates of the said testator, or into the receipt of the rents and profits thereof.

That at the time of the death of her father, the said testator, the complainant was an infant, under the age of twenty-one years, and that she did not arrive at the age of twenty-one years until the fourteenth day of April, in the year of our Lord one thousand eight hundred and forty-five.

That the said Lucretia Scott, executrix as aforesaid, on or about the first of February, one thousand eight hundred and forty-one, married one Philip Gamble, and that after her marriage with the said Philip Gamble, the conduct of the said Lucretia, the said executrix, towards complainant and the other legatees, became changed, and a course of proceedings adopted to place as much of the property of the said testator, within the power and under the control of the said Philip Gamble, as possible, and to the detriment of complainant, and the other children of the said testator.

That, with the view of benefitting the said Philip Gamble and the said Lucretia, at the expense of complainant and her sisters, the said Lucretia, by virtue of the discretion reposed in her by the said will of the said testator, pretended to sell and dispose of all the residue of the lot of land and real estate in said plan called lot No. 5 (five,) and situate in the said city of Trenton, bounded by said Academy street, Montgomery street, the Friends' burying ground, and lot No. 4.

That the said Lucretia, the executrix as aforesaid, instead of selling the said real estate fairly and *bona fide* for the best price that could be obtained for the same, entered into a conspiracy or agreement with the said husband, Philip Gamble, to enable him to obtain the said real estate at a sum much below its real value, and to have the title to said real estate for the benefit of the said Philip Gamble and his said wife Lucretia, the said executrix. She, the said Lucretia Gamble, as the executrix of the said testator, Leonard Scott, united with her said husband, Philip Gamble, in a deed, whereby, for the pretended consideration of the sum of eight hundred and thirty-one dollars, recited to have been paid by one Thomas Gordon, to the said Philip Gamble and Lucretia his wife, executrix as aforesaid, they conveyed to the said Thomas Gordon, on or about the twentieth day of July, in the year of our Lord one thousand eight hundred and forty-three, all the said real estate above mentioned, and described as lot No. 5 (five,) except the buildings thereon, in fee simple.

That although the said deed of conveyance bears date on the twentieth day of July, in the year aforesaid, yet that the same was not acknowledged until the twenty-fifth day of the same month, when it was acknowledged before Stacy G. Potts, Esquire, as a master in chancery, and who is also the only subscribing witness to the said deed.

That in the same twenty-fifth day of July, in the year aforesaid, the said Thomas Gordon reconveyed the same premises back to the said Philip Gamble, for a consideration recited in the said deed to be the sum of eight hundred and

two dollars, and that the said last mentioned deed was also acknowledged before the said Stacy G. Potts, Esquire, on the same day, and who was also the only subscribing witness to this deed. The bill charges these deeds to be mere contrivances of the said Philip Gamble and Lucretia his wife, who was executrix of the said Leonard Scott, to evade that salutary rule of law and equity, which prohibits an executrix purchasing any of the estate, which she is directed under the will to sell, and that the said deeds are fraudulent and void as against her.

That no money was paid by the said Thomas Gordon to the said Philip Gamble and Lucretia Scott, at the executing the said deed so made to him as aforesaid, and that no money was paid by the said Philip Gamble to the said Thomas Gordon, at the time of the execution of the said deed from the said Thomas Gordon to the said Philip Gamble, on account of the consideration money mentioned in said deed.

That upon the said sale so made by the said Thomas Gordon to the said Philip Gamble, the said Philip Gamble executed a mortgage on said premises to said Thomas Gordon, for the sum of eight hundred and two dollars and fifty cents, to secure the payment of three several bonds, conditioned for the payment of two hundred and sixty-seven dollars and fifty cents each, and two of which said bonds were delivered to Caleb S. Green, Esquire, for the benefit of complainant and her sister Amanda Scott, and that the said Caleb S. Green afterwards collected the said two bonds, and paid over the amount thereof to complainant and her said sister Amanda, respectively, and the remaining bond the said Philip Gamble delivered to Messrs. Titus & Brother, of the city of Trenton, in payment or discharge of a store account due to them by the said Philip Gamble.

That the said sale so made by the said Philip Gamble and Lucretia his wife, executrix of Leonard Scott, to the said Thomas Gordon, was not a sale for the best price that could have been obtained for the same, and that they well knew that a much larger sum could have been obtained for the

same upon a fair public sale thereof, than the said sum of eight hundred and thirty-one dollars, and that the said lot number five was, at the time of the said sale to the said Thomas Gordon, worth the sum of fifteen hundred dollars.

That the said Lucretia Gamble told the complainant that, before the said sale, that Mr. Titus had offered her fifteen hundred dollars for said lot, but that she, the said Lucretia, would rather that Gamble should have the lot; and that complainant replied that she would rather that her mother should keep the lot and not sell it.

That the said Philip Gamble has, since the said pretended sale to said Thomas Gordon, repeatedly admitted that he, Gamble, had bought the said lot at the said public sale, and not the said Gordon; and upon the said Philip Gamble's being told by a person who was able to purchase said lot, that if he had known it would have gone off so cheap, he would have purchased said lot, the said Philip Gamble replied, no, you could not have bought it, for Gordon bought it for me.

That the said Thomas Gordon never took possession of the said lot number five, under his said deed, but that the same was, at the time of the said sale, in the possession of the said Philip Gamble, and remained in his possession or the possession of his tenants ever since, with the exception of a very small part thereof, which he conveyed on or about the sixth of June, in the year of our Lord one thousand eight hundred and forty-eight, to one William C. Beatty, for the consideration of four hundred dollars, and took a mortgage on the same for the consideration money, or a great proportion thereof.

That the said Philip Gamble hath, from the time of the pretended sale to the said Thomas Gordon, always received the rents, issues, and profits of the said premises, with the exception of that part thereof so sold to said William C. Beatty, from the time of the said sale to said Beatty.

That the said Lucretia Gamble, executrix of said Leonard Scott, did not, on the sale of said lot number five, put out

at interest on real security, the net proceeds of the sale of the said lot number five, but wholly neglected so to do.

That on or about the first day of May, in the year of our Lord one thousand eight hundred and forty, and while complainant was a minor, and of the age of only eighteen years, the said Lucretia Gamble sent the book of complainant, in which was entered the amount of money which was deposited to her credit in the Savings Fund of Philadelphia, to the Saving Fund Institution at Philadelphia, for the purpose of drawing out the moneys to which she was entitled, but the officers of the said institution declined to pay the said money to the said Lucretia, and the said Lucretia thereupon directed and requested complainant to go to Philadelphia and draw out of said Saving Fund Institution the amount of money she had there deposited to her credit, and persuaded and induced her to loan the said money, amounting to the sum of two hundred and eighty-seven dollars, under pretence that she desired to improve the said lot number five, by building thereon. And complainant believing that her mother, as the executrix of her said father, wished to improve said lot number five, for the mutual benefit of herself and her children by the said testator, loaned to her the said sum of two hundred and eighty-seven dollars, and the said Lucretia expended the same in the purchase of materials for building two dwelling houses on said lot number five, and in building the same; and the said Lucretia Gamble and her said husband Philip Gamble, after the said two houses were built on said lot, took possession of said houses, and rented them out and received the rents thereof, and they still claim possession of said houses; and the said Lucretia Gamble and Philip Gamble have not, nor hath either of them, returned to her the money obtained from her by said Lucretia, in the manner aforesaid.

That the said Leonard M. Scott and Henrietta Ann Scott, two of the legatees in the said will of the said testator named, departed this life under age, and without issue, leaving the complainant and her said sister Amanda Scott them

surviving, and thereby the legacies in said will bequeathed to said Leonard M. Scott and Henrietta Scott, vested in the said Amanda Scott and complainant.

The bill further charges that the said sale made by the said Philip Gamble and Lucretia Gamble, executrix of Leonard Scott, to the said Thomas Gordon, was not *bona fide*, and was not for a full and fair consideration, and was not for as much as could have been obtained therefor; and that the said lot of land might have been sold for a much larger amount of money, but for the default, neglect, and contrivance adopted by the said Philip Gamble and Lucretia Gamble, to enable the said Philip, through the instrumentality of the said Thomas Gordon, to obtain the title to said lot, for a little more than half its real value.

And that the said Thomas Gordon only acted as the agent of the said Philip Gamble and Lucretia his wife, to enable them to obtain the title to said lot by indirect means, because the law would not allow the said Philip Gamble and Lucretia his wife, executrix of Leonard Scott, deceased, to sell the said lot to the said Philip Gamble.

The bill prays that an account may be taken of the personal estate and effects of the said testator, which have come to the hands or use of the said Philip Gamble and Lucretia his wife, executrix of said Leonard Scott, and that an account of the rents, issues and profits of lots No. 2, 3, 4 and 5, in said will mentioned, which have come to the hands of said defendants, or either of them, or but for the wilful default or neglect of the said defendants, might have been received by them, or one of them, from the time complainant arrived at the age of twenty-one years.

And that the said Philip Gamble and Lucretia his wife may be decreed to pay to the complainant the money borrowed of the complainant as aforesaid.

And that the said Philip Gamble and Lucretia his wife, executrix of Leonard Scott, may be decreed to account for so much of lot No 5 (five) as the said Philip Gamble has sold to the said William C. Beatty, and that the residue of the said lot may be sold under the order of this honorable court,

and the proceeds thereof distributed according to the terms and directions of the said will of the said testator, or that it may be referred to a master, to ascertain what was the fair value of the said lot No. 5 (five) at the time the said deed was made to the said Thomas Gordon, and that the said defendants may be decreed to account to the complainant for her just distributive share of said value, according to the terms and directions of the said will of the said testator.

Philip Gamble and wife, by their answer, admit it to be true—that the said Leonard Scott, late of the city of Trenton, in the State of New Jersey, did, shortly before his death, and at or about the time mentioned in the said bill of complaint, duly make and publish his last will and testament in writing, to such purport or effect as is in the said bill of complaint, in that behalf alleged, and that the same was executed and attested in such form as is required by the laws of this State.

And they admit it to be true that the said Leonard Scott, the said testator, departed this life at or about the time in the said bill mentioned, without having revoked or altered his said will, leaving the said complainant, and Amanda Scott, Henrietta Scott, and Leonard M. Scott, his children, him surviving, and that soon after the death of the said testator, the said Lucretia Gamble, one of the said defendants, then Lucretia Scott, the executrix in the said will named, duly proved the said will as in the said bill of complaint is set forth, and took upon herself the execution thereof, and possessed herself of the personal estate and effects of the said testator, and entered into the possession of the real estate of the said testator, which real estate consisted of lots of land situate in the said city of Trenton, mentioned in the said will of the said Leonard Scott, deceased, and designated in the said will and the said bill of complaint as lots No. 1, 2, 3, 4 and 5, and that the personal estate of the said Leonard Scott, deceased, which came to the hands of the said Lucretia, as executrix of the said will was amply sufficient

to pay the funeral expenses, debts and legacies of the said testator.

That at the time of the death of the said Leonard Scott, the said complainant was an infant, and that she did not arrive at the age of twenty-one until at or about the time in the said bill of complaint in this behalf alleged.

That they were intermarried as is by the said complainant averred, but not at the time in the said bill of complaint mentioned, but on the sixteenth day of August, in the year of our Lord one thousand eight hundred and forty. But they expressly deny that after their intermarriage, the conduct of the said Lucretia, the said executrix, became or was changed in any respect towards the said complainant or to the other legatees, or that any course of proceeding adopted, or any act done by these defendants, or either of them, to place the property, or any part of it, of the said testator, the said Leonard Scott, within the power, or under the control of the said Philip Gamble, to the detriment of the said complainant, or the other children of the said testator.

They admit that the said Lucretia Gamble, the said executrix, by virtue of the power vested in her by the said will of the said testator, on or about the twentieth day of July, in the year of our Lord one thousand eight hundred and forty-three, sold the said lot of land designated as lot No. 5, and described in the said bill of complaint; but they absolutely deny that the said sale was made with a view of benefitting these defendants, or either of them, to the prejudice of the said complainant and the other legatees, or any or either of them, or that these defendants entered into any conspiracy or agreement so as to enable the said Philip Gamble to obtain, directly or indirectly, the said lot of land for a less sum than its real value, or into any conspiracy or agreement in regard to the said sale; and these defendants further absolutely deny that the said sale was a pretended sale, but with an honest intention of making the said lot bring as much as possible; that the said sale was advertised for more than two weeks prior to the time of the said sale,

in the "Emporium and True American," a newspaper at that time printed and published in the said city of Trenton, and at the time so advertised was sold at the inn of Charles Howell, in the said city, which was the place designated in said advertisement; that the said sale was attended by a large number of persons. That the said lot, with the purpose of getting a large price, was divided into two parcels, both of which were cried off at public auction, at the said time and place, by Joseph A. Yard, at that time an auctioneer in the said city. That several persons bid for the said lots, but Thomas Gordon being the highest bidder for each of the same, they were publicly struck off to him; and these defendants further expressly say that the said lot No. 5 was thus *bona fide* sold to the said Thomas Gordon, for a full and fair consideration, and for the best price, according to the best of the knowledge, information, hearsay, and belief of these defendants, that could be obtained for the same, and that no better price by any means known to these defendants, could have been obtained for the said lot, and that the said Philip Gamble did not request the said Lucretia to sell the said lot No. 5, or give any directions how the said sale should be made or in any manner interfere with the same; but that the said sale was made at the instance of the said Thomas Gordon, who had been for a long time before the death of the said Leonard Scott, the confidential friend and man of business of the said Leonard Scott, and who, since the death of the said Leonard Scott, had held in his hands, and under his control, the entire personal estate of the said testator, and continued to hold the same until its final distribution according to the provisions of the said last will; and these defendants further deny that it was understood between them, or between them and the said Thomas Gordon, that he, the said Thomas Gordon, should buy the said lot of land for these defendants, or either of them.

That it was not by his coercion, procurement, solicitation or advice that the said sale of the said lot No. 5 was made, and that he did not know that the same was intended to be

sold, until he was casually informed that an advertisement for the sale of the same was in the newspaper aforesaid, and that he believes the said advertisement was put into the said paper by the said Thomas Gordon; that upon being informed of the fact of the said advertisement, he immediately called on the said Thomas Gordon in reference thereto, and was informed by the said Thomas Gordon, that the will of the said Leonard Scott (which said will, at that time, he, the said Philip Gamble, had never seen,) required the said sale to be made, but that he, the said Gamble, although he could not be permitted by law to buy the said premises, would have the privilege of removing the houses which he had erected thereon; and the said Philip Gamble absolutely denies that he employed the said Thomas Gordon to purchase the said lot, or any part thereof, for him, the said Philip Gamble, or that there was any understanding between them to that effect, but on the contrary thereof, when the said Gamble applied to him, said Gordon, on the day of the said sale, to permit him to take, the said Gamble to take the said lot at the price for which the same had been struck off; he, the said Gordon, refused so to do, and that it was not until the following day that he accepted said offer. And the said Philip Gamble expressly denies that he has ever admitted that he, and not the said Gordon, bought the said lot at the said public sale; and that he has no recollection of any person saying to him that if he (said person) had known said lot would have gone off so cheap, he (said person) would have purchased said lot; and that if any such remark was ever made to him, the said Gamble, that he did not reply or say, "no, you could not have bought it, for Gordon bought it for me," or any reply in language of similar import.

That they have never had any knowledge, information, or belief, that the said lot No. 5, at the time of the said sale, was worth more than the sum of eight hundred and thirty-one dollars, the price for which it was sold; and that no person ever offered the sum of fifteen hundred dollars, or any other sum, for the said lot number 5; and the said Lucretia Gamble expressly denies that she ever told the said

complainant or any other person that any person had offered her fifteen hundred dollars, or any other sum, for the said lot No. 5, and that she did not say that she, the said Lucretia, would rather the said Gamble should have the said lot, or words to that effect.

They admit it to be true, that at the time mentioned in the said bill of complaint in this behalf, they executed a conveyance for the said lot No. 5 to the said Thomas Gordon, and that Stacy G. Potts, Esquire, is the sole witness to the said deed, and that the date of the acknowledgment is also correctly set forth by the said complainant; and they further admit, that at the same time the said Thomas Gordon executed a conveyance of the same premises to the said Philip Gamble, for the same consideration for which he had purchased the same, after deducting the expenses of the said sale; and that the said last mentioned deed was also acknowledged before the said Stacy G. Potts, Esquire, he being also the witness to the same, on the day and year set forth in this respect in the said bill; and they admit, that at the time of the sale no money was paid by the said Thomas Gordon or the said Philip Gamble, but the whole of the purchase money was secured by the said Gamble giving his three several bonds, and a mortgage in the amount and in the manner set forth in the said bill; which said bonds and mortgage were drawn by the said Thomas Gordon, and were delivered to him by the said Gamble for the benefit of the said estate, and were so held by him, he being the agent of the said Lucretia, the said executrix, and having in his hands all the moneys left by the said Leonard Scott; and that afterwards two of the said bonds were applied by the said Thomas Gordon as in the said bill of complaint is mentioned, to the payment of the shares in lot No. 5, of the said complainant and her said sister Amanda, and that the third bond, which, under the said will of the said Leonard Scott, was the property of the said Lucretia Gamble, was given to the said Messrs. Titus & Brother, in part payment of a store account incurred for family expenses, the greater part of which said account had occurred

before the said intermarriage of these defendants, and a considerable part was for dress and other things provided for complainant and her sisters at their request, and thus, as these defendants say, the net proceeds arising from the sale of lot No. 5 were put out at interest on real security, in compliance with the said will, and that the said bonds have since been fully paid and discharged by the said Philip Gamble. And they further, altogether deny that the said deed from them to the said Thomas Gordon, or the said deed from the said Thomas Gordon to the said Philip Gamble, or either of them, were contrivances of theirs, or either of them, or of any other person, to evade the rule of law and equity which prohibits an executrix from purchasing any of the estate which she is directed under the will to sell, or of any other rule of law or equity.

They admit it to be true, that the said Thomas Gordon never took possession of the said lot No. 5, but that ever since the said sale, the said lot has been in the possession of the said Philip Gamble, with the exception of that certain portion sold by the said Philip Gamble to the said William C. Beatty, for the consideration and in the manner in the said bill of complaint alleged, and that he, the said Gamble, has always received the rents and profits of the said lot No. 5, since the said sale, with the exception of the rents of the part sold as aforesaid to the said William C. Beatty.

That at the time of the sale of lot No. 5, the said complainant, Elizabeth Scott, was in the twentieth year of her age, and that, although she was living at home, with the said defendants, she was not under the influence or control of her said mother, and was well acquainted with her rights, under the said will of her said father; and that before the time of the said sale, she, the said complainant, had employed legal counsel, and cited her mother, the said Lucretia, into the Orphans' Court of the County of Mercer, and on the first day of July, in the year of our Lord one thousand eight hundred and forty-three, (the same being the month and year in which the sale took place,) obliged her said mother to give security for the faithful and due performance

of her duties as executrix, and her trusts under the said will, and that at the time the said complainant knew the manner in which the said sale was conducted, and the price for which the said lot No. 5 sold, and that the said lot was struck off to the said Thomas Gordon, who thereafter conveyed it to the said Philip Gamble; and that the said complainant further knew that the said Thomas Gordon held one of the said bonds (given as aforesaid by the said Gamble) in trust for her, and as her share of the proceeds of the said sale of the said lot, and that she was entirely satisfied therewith. That on or about the twentieth day of March, in the year of our Lord one thousand eight hundred and forty-seven, long after the said complainant and the said Amanda Scott had arrived at full age, they voluntarily and with a full knowledge of all the facts and circumstances of the said sale, received and accepted the said two bonds and the mortgage aforesaid, securing the payment of the same by assignment from the said Thomas Gordon, in full satisfaction and discharge of their respective shares in the proceeds of the sale of lot No. 5, and in the presence of Caleb S. Green, Esquire, who, before that time, had been their guardian, and was then their legal adviser, severally signed a receipt or acquittance for their said respective shares, in writing, bearing date the day and year last aforesaid.

The defendants pray that they may have the same benefit from the said settlement as though they had pleaded the same, in bar of the said claim of the said complainant in this behalf set forth in the said bill of complaint.

And the said Lucretia Gamble, one of the defendants, in further answering, says, that she has no recollection of ever sending the book of the said complainant, in which was entered the amount of money deposited to the said complainant's credit, in the Safety Fund of Philadelphia, or any other book of the said complainant, or that she ever directed or requested the said complainant to go to Philadelphia and draw out the said money from the said Saving Fund; and this defendant expressly denies that she ever received the

sum of two hundred and eighty-seven dollars, or any other sum of money from the said complainant as a loan, under pretence that she desired to improve lot No. 5, or for any other purpose, or under any other pretence whatsoever.

The defendants further say, that they absolutely deny that the said buildings, or either of them, put up on lot No. 5, were put up in part or in whole with any money borrowed or derived from the said complainant, but on the contrary thereof, that the said buildings were erected and paid for by the said Philip Gamble, out of his own private estate.

They admit it to be true that the said Leonard M. Scott and Henrietta Ann Scott, two of the legatees in the said will of the said Leonard Scott, deceased, named, departed this life under age and without issue, as is charged in the said bill of complaint.

As to that part of the complainant's bill which calls on the defendants to account for the personal estate and effects of the said testator which may have come into their hands, and of the rents, issues and profits of lots No. 2, 3, 4 and 5, which have come or ought to have come into their hands prior to the time the complainant came of age, they submit, that as all the personal property, after the payment of debts and expenses, and pecuniary legacies, was given to the said Lucretia, one of the defendants, by the said will; and as the use and enjoyment of lot No. 1 is given to the said Lucretia by said will during her natural life, and also the use of lots No. 2, 3, 4 and 5, until the daughters of the said testator should respectively attain the age of twenty-one years, that they cannot be required, either in law or equity, on any ground stated or set forth in the complainant's said bill, to make any such account, there being no allegation or pretence that the said legacies have not been fully paid, so far as this complainant is interested therein.

Wm. Halsted for complainant.

Messrs. *Beasley* and *P. D. Vroom* for defendants.

THE CHANCELLOR. The doctrine, as laid down by Sir Edward Sugden, in reference to the incapacity of a person, in the exercise of his duty as trustee, becoming the purchaser of the property of his *cestui que trust*, has always been recognized as the law in New Jersey. He says, (2 *Sugd. Vendors and Purchasers*, 109,) "it may be laid down as a general proposition, that trustees—unless they are nominally such to preserve contingent remainders—agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restraints which will shortly be mentioned. For if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor, vendit quam maximo potest.*"

The courts of law in this State have carried this doctrine to the extreme, in its application to executors and administrators purchasing the property, which in such representative capacity they were authorized to sell. They have declared that a deed to them, as such purchasers, could not be set up in an action at law against the *cestui que trust* and those claiming under them; and that a person who has a right to avoid such a deed, may make his objection to its validity in an action of ejectment, and is not obliged, in order to impugn it, to resort to the Court of Chancery. *Winans v. Brookfield*, 2 *South.* 847; *Den v. Wright*, 2 *Hal.* 179; *Den v. McKnight*, 6 *Hal.* 385; *Den v. Hammer*, 3 *Harr.* 74.

And the Court of Errors and Appeals, at the term of March last, in the case of *Mulford v. Merick and others*,

gave its sanction to the principle as it had been heretofore maintained by the courts of law in this State.

There is no case reported, where the principles applicable to such purchases have undergone an examination in the Court of Chancery in this State, but the doctrine as laid down in *Davoue v. Fanning and others*, 2 *Johns. Ch. R.* 252, and *Michard et al. v. Girod et al.*, 4 *How.* 552, has always been recognized and approved. An executor selling land in the execution of a trust expressed in the will, either at public or at private sale, or under an order of the court, cannot, either directly, or through the agency of another, become the purchaser, or interested in the purchase, at such sale. It matters not how fairly the sale may have been conducted, or that the property was sold for its full value, it is at the option of the *cestui que trust* to avoid it at his pleasure. The sale is void as to him, if he shall elect so to treat it, and it is his right, which a court of chancery will not refuse, to have the purchase set aside, and the property re-exposed to sale under the direction of the court.

It was argued by the defendants' counsel, that the rule thus laid down is too stringent—and in very many cases would operate to the prejudice of the *cestui que trust*—that a child, an executor to his father's will, desirous of purchasing the estate of his ancestors, and willing to give more than its value, *pretium affectionis*, is prohibited by so stringent a rule, not from making a good bargain, but from gratifying the most honorable promptings of the heart. If this were true, yet the particular hardships it may work, are much more than counterbalanced by the general beneficial tendency of the rule. It is a rule as essential to sound morals as it is to pure administration of justice. A relaxation of it, by compelling the party seeking to set aside a sale, to show inadequacy of price, unfairness, or positive fraud, would be a protection to fraud in nine cases out of ten. The seller, whose duty it is to procure the highest price, not being allowed, by the temptation of making a good bargain for himself, will exercise a diligence, and make

efforts, the relaxation of which would follow the abandonment of the rule, and must necessarily operate to the disadvantage of the *cestui que trust*, and amount in fact to a fraud upon him, which the court would not be able to reach upon the mere ground of inadequacy of price. A positive fraud committed upon the rights of an infant, after a lapse of years, in consequence of the death of witnesses, and numberless other incidents, could but seldom be proved.

But the principle has been so ably vindicated by Chancellor Kent, in the case in 2 *Johns.*, already referred to, and by the ablest chancellors of England, whose opinions are reviewed by Chancellor Kent, that a reference to the Chancellor's opinion renders any thing I can say in support of it superfluous. I adopt the rule in the broadest extent as recognized by him. Subsequent decisions in New York have followed the principles laid down by Chancellor Kent. *Rogers v. Rogers*, 3 *Wend.* 503; *De Cater and wife v. Le Ray, De Chaumont and others*, 3 *Paige*, 178; *Van Epps and wife v. Van Epps*, 9 *Paige*, 237; *Torrey v. Bank of Orleans*, 9 *Paige*, 649; *Conger v. Ring*, 11 *Barb. Sup. C. Rep.* 356; see also 1 *S. Eq.* § 322.

But the hardship referred to by the defendants' counsel is not without a remedy. A trustee may purchase at his own sale with the consent of this court, and that consent may be obtained by bill, or perhaps by petition.

In *Campbell v. Walker*, 5 *Ves. Jr. Rep.* 678, the master of the rolls, in replying to a like suggestion, says: "The only thing a trustee can do to protect his purchase is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than any one else, that a bill should be filed, and he should apply to this court, by motion, to let him be the purchaser. That is the only way he can protect himself; and there are cases in which the court would permit it: as if only five hundred pounds was offered, and the trustee will give one thousand pounds. The consequence would be, the court would do that, which this rule is calculated to procure. The court would divest him of the character of trustee, and prevent all the consequences of his

acting both for himself and for the *cestui que trust;* for the reason of the rule is, that no man shall sell to himself; a case in which it is impossible for the court to know, that he did not do all he ought to have done. In no other way, that I can figure to myself, except that I have mentioned, can the trustee become the purchaser, without being liable to be called upon to give up the purchase." And again, in speaking of the rule, he says, "I know, it very often turns to the disadvantage of the infants; but I cannot help that. It is better to adhere to the general rule. I wish it to be understood upon what terms trustees may purchase, so as to be protected from this equity; and I repeat, there is no other way than that I have mentioned: a bill filed; and the trustee saying so much is bid; and he will give more. The court would examine into the circumstances; ask who had the conduct of the transaction; whether there is any reason to suppose the premises could be sold better; and upon the result of that inquiry would let another person prepare the particular, and let the trustee bid." The history of this case (further reported in 13 *Ves.* 600) is a most triumphant vindication of the propriety of the rule itself. The conduct of the trustees who had purchased was not impeached, and the master of the rolls took occasion to say, that he did not wish to be considered as reflecting upon them. He ordered a reference to a master for inquiry. The master reported the value of one of the estates to be near double the price given by the trustees; and upon the re-sale it actually produced double.

It remains to apply the principle to the case before us.

Philip Gamble intermarried with Lucretia Gamble, who was the executrix of her late husband, and who had proved, and taken upon herself the execution of the will. By his marriage he assumed all the duties and responsibilities which devolved upon his wife as executrix. She could only act under his control and with his assent—his interest was one with her's—they are one in the law. The husband is liable in law and equity, as long as both parties are alive, for the acts of his wife as executrix, for, as she has no power to act

alone, his assent will be presumed. He acts in his wife's right for his own safety. It was the interest of the executrix, that the husband should buy the property at a small price.

But it is unnecessary to pursue this branch of the case further, as it was not pressed by the defendant's counsel. If Philip Gamble, the husband of the executrix, purchased the property, the rule, as it has been laid down, is applicable.

I cannot give my entire approbation to the manner of the sale. The *cestui que trust* were infants. The step-father, one of the defendants, had erected buildings on the lots, as he alleges, in ignorance of his rights. It was of great importance to him to become the owner of the lots, and not be put to the expense of removing the buildings. By his marital rights, the control of the property of these infants had devolved upon him. Under these circumstances, more than ordinary caution was necessary in conducting the sale. Yet the advertisement was for only two weeks in a weekly newspaper, and no other notice of the sale was given. The evidence as to what took place at the time of sale, shows, that not much effort was made, if any, to procure bidders. But, notwithstanding all this, the evidence, I think, establishes the fact that the lots brought their full value. It is true, there are witnesses of the complainant's who rate the value of the lots at a much higher price than they were struck off at; but their means of information do not entitle their judgment to the same weight as that of the defendants' witnesses. If the price really was an inadequate price, or any thing below the real value of the property, there could be no difficulty, situated as these lots are in the city of Trenton, where property has a fixed value, in the complainant's establishing the fact. The evidence in the case proves that the property brought its value.

Did Gamble purchase at the sale? It is denied by the answer, and was earnestly contended on the argument, that the proof in the case does not establish the fact.

The property was struck off to Thomas Gordon. Mr. Gordon had been, and was then, the agent of the defend-

ants, and, according to the answer, had "held in his hands and under his control, the entire personal estate of the said testator, and continued to hold the same until its final distribution." He was present at the sale, and acted as clerk, and it was made at his suggestion, and under his management and superintendence. He told Gamble, on the day previous, that he, Gamble, could not be permitted, by law, to purchase. The property was struck off to Mr. Gordon. On the day of the acknowledgment of the deed from the executrix to Mr. Gordon, Gordon conveyed to Gamble for the same price that the property had been struck off at the public sale. Gordon paid no part of the purchase money, but it was secured by Gamble, which securities were drawn up by Gordon, and were received by him, after the execution, as the agent of the executrix, and were held by him until disposed of agreeable to the directions of the will.

Mansfield Herbert testifies, that in a conversation with Gamble, the witness said to Gamble, if he had been at the sale, Gamble would not have got the lots at the price he did. To which Gamble replied, "You could not have bought them, for my houses were upon them. I got Mr. Gordon to buy them for me."

Isaac Welsh says, that he said to Gamble, "You bought this property, Mr. Gamble." He replied, "Yes, I bought it." This was about a month after the sale.

The effort to impeach the testimony of these witnesses entirely failed.

George Shreeve says, that after the examination of Mansfield Herbert in this cause, Gamble told him that the witness had sworn to a falsehood, "that he, Gamble, had never told Herbert that he, Gamble, had got Judge Gordon to buy those lots for him, but that he had told Mansfield Herbert that Judge Gordon had bought the lots for him, Gamble;" and Gamble told the witness in this conversation, that Judge Gordon had bought the lots for him, but that he had not asked him to do it.

I think, the positive evidence, and the circumstances attending the whole transaction, make out very clearly that

the purchase was made by Judge Gordon for Philip Gamble. It is a conclusion, which can hardly be resisted, from the evidence, both positive and circumstantial, in the case. The efforts to cover up the fact, only make it the more palpable.

But the defendants, by their answer, insist, that the complainant has ratified the sale, by receiving, after she arrived of age, with full knowledge of all the facts, her proportion of the purchase money.

Philip Gamble, in payment for the property, executed a mortgage on the premises to Judge Gordon, for the sum of eight hundred and two dollars and fifty cents, to secure the payment of three several bonds, conditioned for the payment of two hundred and sixty-seven dollars and fifty cents each. Under the will of Leonard Scott, the testator, when Amanda, the youngest child, arrived at the age of twenty-one, in consequence of the death of all the legatees except the complainant and her sister Amanda, the complainant became entitled to one-third of the proceeds of the sale, and her surviving sister to one-third. One-third belonged to the executrix.

Two of these bonds went into the hands of Judge Gordon, in trust, for the purposes of the will, and to secure the shares of these two daughters.

After the complainant arrived at age, and as soon as by the terms of the will she was entitled to her share of the proceeds of the lots, Judge Gordon assigned one of the bonds to the complainant, and one other to her sister Amanda. The third belonged, as before stated, to the executrix absolutely. On the assignment of the bonds, the complainant and her sister gave the following receipt:—

Philip Gamble to Thomas Gordon. } Two Bonds, each dated July 25, 1843, and made in the penal sum of five hundred and thirty-five dollars each, conditioned for the payment of two hundred and sixty-seven dollars and fifty cents each, at the time therein specified.

Philip Gamble to Thomas Gordon. } Mortgage dated July 25, 1843, on property in the city of Trenton, to secure the payment of the above bonds.

We, Elizabeth Scott and Amanda Scott, daughters of Leonard Scott, deceased, hereby acknowledge that we have received the above bonds and mortgage, given to secure our respective shares of the proceeds of the sale of a certain lot, sold under the will of the said Leonard Scott, deceased, the same having been held in trust for us by the said Thomas Gordon, and now assigned to us by him, March 20th, 1847.

ELIZABETH SCOTT,
AMANDA SCOTT.

Witness present—CALEB S. GREEN.

This receipt is in the hand-writing of Caleb S. Green, Esq., counsellor at law, and witnessed by him. At the time of its execution, Mr. Green was acting as the attorney of the complainant and her sister, in regard to that business. He had been the guardian, appointed by the Orphans' Court, of each of them, until they respectively arrived at age. Mr. Green afterwards collected the money on these bonds, after commencing to foreclose mortgage, and paid over the proceeds.

The question arises, under these circumstances, and after having received, with full knowledge of the facts, the proceeds of the sale, is the complainant entitled to have the sale set aside, and a re-sale of the property? The fact of her having received the purchase money is not an absolute estoppel to the complainant's right of avoiding the sale; for no matter what the ratification by her might have been, whether by the mere receipt of the purchase money, or by a more solemn act of release under seal; if such ratification had been without a knowledge of the facts, and in ignorance of her rights, it would be no obstacle to her obtaining relief.

But, on the contrary, when such act of ratification is done with deliberation, and with a knowledge of the fact which would avoid the sale, it is a bar to any relief which this court might otherwise have afforded.

In the case of *Michoud et al. v. Girod et al.*, before referred to, two of the complainants had given receipts and acquittances to the executors. But the complainants put

their case, upon the ground that these acquittances were given in ignorance of their rights. That issue was made by the pleadings. (See state of case 524, 525 of 4 *Howard.*) The bill charged, that by concealment of facts which they knew to exist, and were bound, as agents, to communicate, the executors obtained from some of them an acquittance or transfer of all claims against the succession; and in page 561 of the case, the court say, "The receipts or acquittances given by two of the complainants to the executors do not affect their rights. They were obviously given without full knowledge of all the circumstances connected with the disposal and management of the estate. Indeed, it is plain that such information had been withheld by the executors."

In the case of *Butler et al. v. E. Haskell*, 4 *Dessaus. R.* 709, a class of cases, very numerous, will be found cited by the court, in reference to the validity of acts of confirmation of contracts originally void or voidable. If will be found, that where the court has refused to them its sanction, it has been on the ground of gross fraud or misrepresentation in the original contract, or when the act of confirmation has been executed in ignorance by the aggrieved party of his rights, or procured under circumstances the court will not countenance.

But the validity of the act of confirmation by the complanant in this case is not put in issue by the pleadings. The complainant, in her bill, states the fact that she received her portion of the purchase money, and makes no complaint of any concealment on the part of the defendants at the time, or that she was ignorant of any of the facts and circumstances of the transaction.

The receipt she gave was in the presence of and under the advice of counsel, drawn up and witnessed by him; it states that the bonds were given for the purchase money; and the mortgage of Gamble, on the very lots to secure the purchase money, is assigned to her. There was no want of time for reflection. The act was a deliberate one; and afterwards the bonds and mortgages were put in suit and the money collected.

In *Betton v. Briggs and others*, 4 *Dessaus. R.* 465, the land in question was the mother's during her widowhood, and Thomas and his two brothers had a joint estate in fee simple after their mother's death. The mother, together with Thomas' two brothers, sold the land to the complainant, with an agreement that Thomas, when he came of age, should confirm it. With the purchase money they bought another estate. When Thomas arrived at age, this last estate was sold, and he joined in the deed of sale, and received his part of the purchase money. This was held a confirmation, and on a bill filed Thomas was decreed to a specific performance of the agreement made by his mother and brothers.

Upon the ground that this sale was ratified by the complainant, by her receipt of the purchase money, and that this act of ratification stands in full force, without even an allegation on the part of the complainant, that what she did was in ignorance of her rights, and without the validity of that act as an act of confirmation being put in issue, I do not feel that I should be justified in interfering with the sale.

This bill is filed for another purpose also. It is alleged that the complainant had deposited to her credit in the Savings Fund Bank of Philadelphia, two hundred and eighty-seven dollars, and that the defendant, Lucretia, induced the complainant to draw this money out of the bank and loan it to the said defendant.

The bill is filed against the defendants in their capacity of trustees, and as the representatives of Leonard Scott, the testator, and the prayer of the bill is in conformity thereto.

If this money belonged to the complainant, as is alleged, and was borrowed by the defendant, Lucretia, or by both of the defendants, why should the defendants account for it as part of the estate of the testator?

The bill is filed against the defendants in their representative characters, and the complainant is entitled to an account in that aspect only.

As to the prayer of the bill, that the defendants may account for the personal estate and effects of the testator, there is no propriety shown for taking these accounts in this court.

Let the bill be dismissed with costs.

RICHARD MOORE v. PHILIP GAMBLE and LUCRETIA his Wife.

There can be no doubt as to the power of the court to grant relief against a judgment which is against conscience, which was obtained by fraud, or in any other way, by which injustice has been done; and where the injured party has had no opportunity of defence, or could not make it through any defect of the law, and where adequate relief cannot be afforded by the court where such judgment was obtained, and timely application for relief is made to this court. *Authorities collected,* 3 *Green's Ch.* 466.

Where the pretended consideration of a judgment in attachment was for the board of the complainant's wife, and it appears that shortly after he married he left for New Orleans, and that during his absence she lived with defendant; that by the will of complainant's wife's father, the executrix was required to educate and support the complainant's wife during her minority, and that in consideration thereof, defendants (the executrix and her husband) agreed not to charge complainant anything for his wife's board; that at the time the attachment was taken out, the defendants had in hands, funds to an amount more than large enough to pay the claim they made, which belonged to complainant in right of his wife; in such a case the complainant would be entitled to be relieved against the judgment.

In such a case of gross wrong and fraud, this court would not stop to inquire, whether or not the injured party might possibly get relief upon an application to open the judgment. Independent of the fact of the alleged agreement, if at the time the board was furnished, the defendants had in their hands funds which belonged to the wife, and which from their nature there would be a propriety in appropriating in liquidation of the debt contracted for board, this court would interfere and compel such appropriation in satisfaction of the judgment.

The bill should state whether the attachment was taken out against the defendant as an absconding or an absent debtor. If the defendant was an absconding debtor, the court certainly would not grant him relief as readily as they would if the proceedings had been against him as an absent or non-resident debtor.

A clause in a testator's will was in the following words: "Lastly. I nominate and appoint my said wife Lucretia Scott executrix of this my last will and testament, and in whose care and protection I leave my said children, and I hereby desire and enjoin upon her to educate and support them during their minorities, respectively, in a decent and suitable manner, for which purpose it is my intention to provide her the means, as well as for the support of herself."

Held, that there was no doubt that while the executrix enjoyed the property, she was bound to maintain the children, during their minority, to the extent of the means thus placed in her hands. But the obligation existed only while the children remained subject to her authority and under her control, as their mother. That a daughter, by marrying, withdrew herself voluntarily from her

mother's family, and accepted the protection and support of her husband, in preference to that offered by the will of the testator. It was an abandonment of the support she might otherwise have claimed.

Bill filed, August 1st, 1849. The cause was heard May term, 1852, upon bill, answer, replication and proofs. The material facts disslosed by the pleadings and evidence are contained in the Chancellor's opinion.

Mr. *W. Halsted* for complainant.

Messrs. *Beasley* and *Vroom* for defendants.

THE CHANCELLOR. I have hesitated whether I ought to decide this case upon the pleadings and proofs before me. Important questions of law and equity were argued by counsel on both sides, upon assumed facts, not warranted by the pleadings or proofs. There are blanks in the bill—not of immaterial matters—but necessary to be supplied by facts, upon which most important questions hinge. There are dates as to deaths of individuals, either erroneous, or else inconsistent with other matters of the bill. Neither the answer or the proofs supply these deficiencies; and yet the rights of these parties are submitted for decision, as though it were of no consequence whether or not any certain issue is made, but the court could go to other sources for information, other than the pleadings and evidence.

I mention these matters in justice to myself. I am greatly embarrassed, from the circumstances mentioned, in deciding the case; and if injustice is done, it is not through defect of the law, or the powers of this court, nor altogether, I trust, my own want of apprehension of the principles of equity which ought to govern the case.

The embarrassments occasioned by the defects referred to, will appear in the course of my opinion.

As to the power of the court to grant relief to the complainant against the judgment in attachment, if a proper case is made, there can be no doubt. The court will grant relief against a judgment which is against conscience, which was

obtained, by fraud, or in any other way by which injustice has been done, and where the injured party has had no opportunity of defence, or could not make it through any defect of the law, and where adequate relief cannot be afforded by the court where such judgment is obtained, and timely application for relief is made to this court. The authorities are abundant, and will be found collected by counsel in the case of *Executors of Powers v. Administrators of Butler*, 3 *Green's Ch.* 466.

The counsel for the complainant insisted, that the pretended consideration of this judgment was for the board of the complainant's wife—that shortly after he married, which was in the year 1838, he left for New Orleans, and that during his absence, and up to the time of his wife's death, in the year 1840, she lived with the defendants—that by the will of the testator, the executrix was required to educate and support the complainant's wife during her minority, and in consideration thereof, the defendants agreed, not to charge the complainant any thing for his wife's board—that at the time the attachment was taken out, the defendants had in hands, funds to an amount more than large enough to pay the claim they now make, which belonged to the complainant in right of his wife.

Such a case would entitle the complainant to be relieved against the judgment. For the defendants, under such circumstances, to have taken advantage of the complainant's absence, when he had no opportunity of being heard, or setting up the legal and equitable defence he had against the defendants' demands, would have been a gross wrong and fraud. In a case so gross, this court would not stop to inquire whether or not the injured party might possibly get relief upon an application to open the judgment. The propriety of affording relief in such a case would be so manifest, and could be afforded with so much facility by this court, there could be no hesitation in granting it. And independent of the fact of the alleged agreement, if at the time the board was furnished, the defendants had in their hands funds which belonged to the wife, and which, from

their nature, there would be a propriety in appropriating in liquidation of the debt contracted for the board, this Court would interfere and compel such appropriation in satisfaction of the judgment. The Court would do this from the consideration that the defendant had no opportunity of making his set-off in the manner prescribed by the statute, and had lost the opportunity in consequence of no laches of his own, and because a court of equity is an appropriate tribunal to settle accounts of such a nature as the complainant alleges exist between the defendants and himself.

But let us see whether the complainant, by his bill, or proofs, makes out such a case, or any case, which entitles him to relief.

In the first place, I remark, the bill does not state, and it does not any where appear in the case, whether this attachment was taken out against the defendant as an absconding, or an absent debtor. This is a matter of some importance. If the defendant was an absconding debtor, the court certainly would not grant him relief as readily as they would, if the proceedings had been against him as an absent or non-resident debtor.

The only charge of fraud as to the attachment, is the following: "And the said Philip Gamble and Lucretia, his wife, with the view and intention, as he verily believes, of defrauding him out of his property, sued out a writ of attachment out of the circuit court of the county of Mercer, returnable to the term of March, 1848, for the sum of $504 57, upon an account against your orator, which is wholly fraudulent and unjust, and when, at the same time, the said Philip Gamble and Lucretia Gamble were, as your orator believes, justly and equitably indebted to your orator in a large sum of money."

I suppose it is an error as to the attachment having been taken out by Philip Gamble and wife. I infer so from the argument, and from the fact that no allusion whatever is made to any debt upon which Gamble and wife jointly could have obtained a judgment against the complainant. If the allegation is true, it makes the case too intricate for me to

unravel; and yet, the answer admits, in almost the very words of the bill, that Gamble and wife did sue out the attachment. The proceedings in attachment are not proved, and I have no means of ascertaining how the fact really is.

But what was the consideration of this judgment? To the suggestion made by the opposite counsel upon the argument, that by the bill the consideration of the judgment was not impeached, it was answered, that the complainant did not know what the consideration was. If the complainant did not really know what the alleged consideration was, he should have so stated in the bill if he intended to impeach the consideration, and to have charged that the judgment was without consideration. All the complainant had to do was to apply to the record of the court out of which the attachment issued, and examine the accounts on file, or if the accounts were not there, to have made application to the auditors.

Not in connection with the statement in reference to the attachment, but in a prior part of the bill, it is alleged, that the wife of the complainant boarded with Lucretia, one of the defendants, from shortly after her marriage until her death. As this is the only fact in the bill from which any indebtedness could possibly arise from the complainant to the defendants, and as it has no connection with any other matter in the bill, by a violent inference, in connection with some admissions made in the answer, we may conclude that the consideration of the judgment was, in part at least, for the board furnished the wife.

The answer responsive to this part of the bill, is as follows: "But these defendants altogether deny that the account for which said attachment was issued, was fraudulent, or unjust, or that the said defendants were at that time indebted to the said Richard Moore, the said complainant, in a large sum of money, or in any sum of money whatever; but, on the contrary thereof, these defendants expressly say that the said attachment was issued by them in order to secure the sum for which, as is stated in the said bill, they obtained judgment, and that a bill of said charges was presented by said Philip Gamble to the complainant, two or three months before the issuing the said attachment, and that the said

complainant did not then pretend, (as is now alleged in the said bill of complaint,) that the said Lucretia had agreed to maintain his said wife, free of expense to him, but on the contrary, the complainant promised the said Philip Gamble to write to him in relation to said bill, but the said complainant having failed so to do, and having neglected to pay the amount of said bill, the said defendants, in order to secure and recover the amount thereof, caused the said writ of attachment, &c."

This is all the answer contains as to the consideration of the judgment.

Assuming, then, that such was the consideration of the judgment, what are the merits of the complainant's case in this particular?

The bill alleges, that by the will of Leonard Scott, Lucretia, the executrix, was bound to educate and support the complainant's wife during her minority, and that in consideration thereof, she agreed not to charge anything for the board. If such agreement had been made between the complainant and Lucretia Gamble, I cannot see how it could bind Philip Gamble. The fact of her being the executrix of the will of Leonard Scott, did not make her competent, after her marriage with Philip Gamble, to make any agreement without his consent, which could be enforced, at law or in equity, against either herself or her husband. The agreement is denied by the answer, and no proof of it is made or attempted to be made.

Were the defendants bound to support the wife of the complainant during her minority, under the will of Leonard Scott?

By the will, there are several devises and bequests of real and personal property to the defendant Lucretia, some to her absolutely, and others of property to be enjoyed by her during the minority of her children. The clause of the will upon which the question arises, is the following:

"Lastly, I nominate and appoint my said wife, Lucretia Scott, executrix of this my last will and testament, and in

whose care and protection I leave my said children, and I hereby desire and enjoin upon her to educate and support them during their minorities respectively, in a decent and suitable manner, for which purpose it is my intention to provide her the means, as well as for the support of herself."

There is no doubt that while the executrix enjoyed this property, she was bound to maintain their children, during their minority, to the extent of the means thus placed in her hands. But this obligation existed only while the children remained subject to her authority, and under her control, as their mother. Henrietta, by marrying the complainant, assumed legal duties and responsibilities inconsistent with such control and authority. Her mother could no longer command her services, which were essential to the support of her household. She gave up the protection to which she was entitled under her mother's roof. She withdrew herself voluntarily from her mother's family, aud accepted the protection and support of the complainant, in preference to that which was offered by the will of the testator. The fund provided might be ample for the purpose for which it was appropriated, while the mother and children remained together with those mutual relations subsisting between them. A severance of these relationships, and a voluntary withdrawal by the complainant's wife from the mother's guardianship, was an abandonment of the support which she might otherwise have claimed.

The complainant himself has produced proof that his wife did not remain with the defendants under an agreement, express or implied, that she was to have her board free of charge. A letter addressed by the defendant Lucretia to the complainant, is exhibited on behalf of the complainant. In that letter an agreement is referred to as having been made between the parties, by which the complainant agreed to pay two dollars a week for his wife's board, and a suggestion is made, that the amount is too small and that fifty cents a week more should be added. There is an acknowledgment also in the letter of a receipt of fifteen dollars from the complainant. This letter certainly refutes the allegation

in the bill, that the defendant Lucretia had agreed with the complainant to board his wife without charge, in consideration of the duties imposed upon her by the will. It is evidence produced by the complainant, and is made admissable by being offered by him.

The only ground of complaint, that I can see, in reference to the charge for board, is the amount. The judgment is for five hundred and four dollars and fifty-seven cents. If the complainant's wife boarded with the defendants from her marriage to the period of her death, at two dollars and fifty cents a week, which is the highest price named in the letter alluded to, the amount, with interest, at the time judgment was rendered, would not amount to three hundred and fifty dollars.

But relief is not sought for on this ground, and there is no allegation of any advantage having been taken in this respect. Besides, I may be mistaken as to the time of the death of the complainant's wife. There is a blank in the bill as to the time of her death, and it is not supplied by the evidence.

The only remaining equity set up by the bill is, that at the time the attachment was issued, the defendants had funds in their hands, belonging to the complainant in right of his wife, which ought to have been appropriated in liquidation of the claim made for the board.

And, first, the bill insists, that the complainant is *tenant by the curtesy* of lot No. 1, mentioned in the will, and that the defendants should account for the rents and profits since the death of Leonard Scott.

If it were necessary for me to decide the question of the complainant's right as tenant by the curtesy, it would be impossible for me to do so upon the facts as stated in the bill. It could not be properly decided, without ascertaining the fact whether Leonard died before or after his sister Henrietta. The bill states that Leonard died in 1842, and that Henrietta died in 1840. And yet the bill alleges, that Leonard died, leaving Henrietta him surviving. The answer treats all these matters as of very little importance, and admits

them, as stated in the bill, to be correct. If the dates in the bill are correct, the question cannot possibly arise.

(1) But admitting the complainant to be *tenant by the curtesy* of lot No. 1, it is a question in which the defendants have no interest, and the complainant can enforce no rights of his, arising from such title, against these defendants, unless he can show that they have been in receipt of the rents and profits. There is no charge to that effect in the bill, and it is not shown, otherwise, how this is a material question in the cause.

(2) As to lot No. 2, which was devised to Henrietta, the complainant's wife, the same remarks are applicable to that lot, as to lot No. 1. There are no rights which the complainant can enforce against these defendants, unless they have been in receipt of the rents and profits. This they deny, and in fact, no charge of the kind is made in the bill, nor is there any proof of their receiving any rents or profits from this lot.

(3) As to lot No. 5. The complainant alleges the sale was void. Admitting it to be void, the complainant does not show how he is interested in that question, or in what manner he can derive any benefit from setting the sale aside. But I have decided as to the validity of this sale in the case of *Scott v. Gamble and wife*, decided at this term. The same evidence as to this sale, was, by consent of council, used in both cases.

(4) As to the two hundred dollars, which the bill alleges, the wife of the complainant, before her marriage with him, deposited in the Saving's Bank of Philadelphia, and which, since her death, Lucretia, one of the defendants, drew out of the Bank: if the allegations in reference to this transaction were all true, the complainant can claim the money only as administrator of his wife, and the defendants are not bound in this suit to account to him for it.

(5) In reference to the other matters in the bill, the wearing apparel, watch, and other articles, and also the payment of twenty-five dollars: if they were proved, I have no means of judging whether any credit has been given for

them by the defendants. In all, they amount but to a small sum, and I do not think the proof in regard to them of such a nature as to justify my interference with this judgment.

This bill must be dismissed with costs. I desire that the conclusion I have reached in this case, as well as that in the case of *Scott v. Gamble and wife*, may not be construed into an approval of the manner in which these defendants have managed the trust committed to their hands. There are strong reasons for supposing, from the developments that have been made, that the rights of his children, which the testator, with so much confidence, committed to the mother, have not been promoted by her marriage with Philip Gamble. And I feel it my duty further to remark, that I do not desire any thing I may have said, to prejudice the complainant in any application he may make for relief to the court in which the judgment in question was obtained.

The decree of this court does not affirm the correctness of that judgment, but only that relief cannot be had against it in this court upon the case made by the bill.

PETER P. BROWN and JOHN P. BROWN, complainants, and JOSEPH E. EDSALL and ELIAS L. HOMMEDIEU, defendants.

Where an injunction had been granted to stay a suit at law, that the defendants might make discovery, and that the complainants might have relief in the premises in this court; and the defendants, subsequently, moved to dissolve the injunction, on the ground that the equity of the bill had been fully answered, and the discovery prayed for obtained; the court refused the motion, because the bill prayed for *relief* as well as discovery, and in regard to a subject matter which appropriately belonged to equity jurisdiction.

But the bill must show a case of manifest propriety in this court's retaining the cause, where a suit has been commenced at law, and the party seeks to change the forum of litigation, and prays for relief as well as discovery.

This cause was argued before the Chancellor, June 1st, 1852, on motion to dissolve the injunction.

Mr. *Gould* for motion.

Mr. *Haines* contra.

THE CHANCELLOR. The defendants commenced an action against the complainants in the Supreme Court of this State, on the joint and several promissory note of the complainants, given by them to the defendants in March, 1845. The suit at law was commenced in April term, 1851, of the Supreme Court. On the 29th of November, 1851, the complainants exhibited their bill. Upon the facts therein stated, they prayed an injunction to stay the suit at law—that the defendants might make discovery, and that the complainants might have relief in the premises in this court. This bill the defendants have answered, and they now move that the injunction, which was granted, staying the proceedings in the said suit at law, may be dissolved, on the ground that

the equity of the bill is fully answered, and the discovery prayed for obtained.

The Court of Chancery, in this state has never adopted the principle, that because its jurisdiction has once rightfully attached, it will retain the cause, as a matter of right, for the purposes of complete relief.

All bills in this court are, in their nature, bills of discovery. Some are bills for discovery purely. When the subject matter is one which is properly cognizable at law only, and adequate relief can be given there, as where damages are to be ascertained, or titles to land tried, and in cases of mere trespass, a Court of Chancery frequently takes jurisdiction, that a discovery may be had on the oath of a party, or to compel the production of papers and documents. The end for which the jurisdiction of the court was invoked having here attained, the party seeks his redress in the proper tribunal at law.

Where a suit has been commenced at law, the defendant may be entitled to a discovery from his adversary, and obtain it by his bill in this court. But if he seeks to change the forum of litigation, and prays for relief as well as discovery, the subject matter must be one which appropriately belongs to equity jurisdiction. His bill must show a case of manifest propriety in this court's retaining the cause. *Fonblanque* and *Cooper* lay it down that "the court, having acquired cognizance of the suit for the purpose of discovery, will entertain it for the purpose of relief in most cases of fraud, account, accident, and mistake." So, if it is plain, that adequate relief can be given, and at the same time a multiplicity of suits be prevented, the court having obtained jurisdiction, will go on and give the proper relief.

The bill before us is for discovery and relief. It is properly framed for a bill of such a nature. It not only avers that the discovery is material for the defence, but also that the knowledge of the facts, upon which the defence rests, are exclusively within the knowledge of the adversary. The relief sought is, that the accounts between the parties, and which are connected with the promissory note upon

which the suit at law was instituted, may be settled in this court, and a decree made consequent upon taking such accounts.

The note in question, together with another note of Peter P. Brown, one of the complainants. for $1,374 88, was given in consideration of a bond and mortgage assigned at the time by the defendants to the complainants. No less than nine promissory notes and one draft have grown out of this transaction, at different times, during the period from March, 1845, and through the year 1849. The note upon which the suit at law was instituted, cannot be settled without bringing all these notes and draft into the account. So intricate have the accounts become between the parties, that it is evident from the answer of the defendant, Edsall, that he himself is uncertain, and is unwilling to say, how the accounts really stand between the parties. The manner in which he speaks of two notes of $354 40 each, given to him by Brown, and of his own note of $354 40, which he exchanged with Brown, shows that the accounts are involved in much difficulty. He says, that he has no knowledge, recollection or belief, that the two $354 notes were paid, and that he verily believes his own note was paid. A business man ought to be able to speak with certainty as to such matters, or state some reason why he cannot do so. The reasonable conclusion is, that the whole transaction between the parties has been very loose. It is manifest that the accounts between the parties are intricate, and that great care and deliberation is required, in order to have them satisfactorily adjusted.

This court is the proper tribunal for the settlement of such accounts. Justice could hardly be done in a hasty trial at the Circuit.

The injunction must stand, and the complainants proceed with their suit.



CASES

ADJUDGED IN

THE COURT OF CHANCERY,

OF THE STATE OF NEW JERSEY,

FEBRUARY TERM, 1853.

DANIEL CRANE and WIFE and others, complainants, and STEPHEN VAN DUYNE, JOHN DEY and WIFE, and others, defendants.

A testator devised to his wife the use of his personal and real estate, as long as she remained his widow, or during her natural life. At her death, or if she married, then at her marriage, all the real estate, and the residue of the personal estate was to be divided equally among the testator's children. The wife married again, and since that time to the filing of the bill, with her husband, remained in the actual possession of the larger portion of the real estate, and they received the rents from the person occupying the residue.

Held, that they must account for the rents and profits of all the real estate, of which the testator died seized, since the date of the marriage.

That they could not claim an allowance for improvements put upon the estate, and for moneys paid for the tillage, care and culture of the land by the widow, during her widowhood.

If a *feme sole* being an executrix or administratrix, wastes the goods of her testator or intestate, and then marries, her husband is liable as long as the coverture lasts for the *devastavit*.

So where the administratrix, for a valuable consideration, and *bona fide* transferred obligations belonging to the estate of the testator to one with whom she subsequently intermarried, he has no right to retain them as his own, but must be held accountable with her for all the property which came to her possession.

The testator gave the use of all his property, except a small legacy to his widow, and the amount was amply sufficient for her own comfortable support, and the maintenance of the children. It was *held*, that the intention of the testator was, that with the use of the property devised to his widow, she should take care of the children; and that she could not claim an allowance for the care, support and maintenance of the children, during their minority, and from the testator's death to the time of her marriage.

All the personal property in the inventory, other than some articles transferred to the children of the testator, remained in specie upon the premises, except a portion thereof, which, *from its nature, was consumed in the use*, and *some live stock that died from disease.*

Held, that this personal property being appropriate and necessary for the enjoyment of the real estate, was legitimately used for that purpose; that when the testator left his widow the *use* of both personal and real property, he did not intend that the personal property should be sold at his death. But the executrix, before she married, should have exhibited her account. As to the property which was necessarily consumed in its actual use upon the premises, and the live stock which perished from disease, allowance was made, at their appraised value. As to the residue, it was held that there was no necessity of selling it, as the executrix and her husband, by continuing in the use of it after the termination of her estate *had converted it*, and *must account for it at its appraised value.* They might have claimed an allowance for its depreciation, if they had not assumed the ownership after their marriage.

The bill was filed October 2, 1852.

It charges that Nicholas Van Duyne, late of the county of Morris, died on or about the 30th of October, 1842—that at the time of his death he was seized of several tracts of land lying in that county, of about one hundred acres, and was possessed also of a considerable amount of personal property consisting of household furniture, farming utensils, grain, stock on his farm, debts due to him, &c.—that he died leaving Hannah Van Duyne his widow, and Stephen Van Duyne, Catherine Ann, (since intermarried with the complainant, D. Crane,) Silas, Elijah, James, Albert and Martin, his children, surviving him.

That by his will, after directing the payment of his debts, &c., he devised as follows:—"I give to my beloved wife, Hannah Van Duyne, the use of all my personal estate of every name and kind, as long as she remains my widow, or during her natural life, with the exception of the sum of four hundred dollars, which I shall hereafter mention: further, I give and bequeath to my beloved wife, Hannah Van

Duyne, the use of my real estate as long as she does remain my widow, or during her natural life. Item—I give and bequeath to my son Stephen Van Duyne, the sum of $400 of my personal estate. Item—I give and bequeath, after the widowhood or death of my said wife, that, all my real and personal estate to Stephen Van Duyne, Catherine Ann Van Duyne, Silas Van Duyne, Elijah Van Duyne, James Van Duyne, Albert Van Duyne, and Martin Van Duyne, to be divided among them share and share alike, and therein and thereby appointed his widow, the said Hannah Van Duyne, and Stephen Van Duyne executors thereof."

That the executors proved the will—that the appraisement of debts due the estate amounted to two thousand four hundred and fifty-three dollars and seventy-five cents, and the personal property to seven hundred and ninety-one dollars and ninety-seven cents.

That all the estate except the legacy of four hundred dollars, which was paid to Stephen, went into the possession of the executrix, as also the title deeds of the real estate—that the executrix threatened to waste the estate, and that she has wrongfully converted considerable part of the personal estate.

That for several years John Dey lived with the executrix as a laborer on the farm, and that in February, 1850, they were secretly married.

That John Dey has possessed himself of the personal estate and effects of the testator, and claims the same as his own, and has entered upon the real estate, and taken the rents and profits, and the title deeds, &c.—that within a year past he has received payment of a bond and mortgage given by one Samuel Dey to the testator, for one hundred dollars—and has in his possession, and claims as his own a promissory note made by John A. Hopper, for three hundred and forty dollars, which was given for a debt due the testator, and which note was assigned to John Dey by the executrix, before marriage.

That said Dey has in his possession a note or bond given to him by one George W. Van Duyne, for the sum of one



hundred dollars. secured by a mortgage, and also a note or bond, given by Moses Young, for one hundred dollars, secured by mortgage; also, a note of one Everett, for one hundred dollars; also, a note of one F. Vanness for fifty dollars, all of which were given for moneys originally belonging to the estate of testator, and have been placed in the hands of John Dey, by his wife, the executrix, to get them out of reach—that said Dey is a man of no responsibility.

That the defendants refuse to account for the estate of said testator.

That James Van Duyne, Albert and Martin refuse to join in the bill, and are therefore made defendants.

The prayer of the bill is, that an account may be taken, and the estate settled in this court, and in the meantime John Dey and his wife may be restrained from collecting, &c., the notes and bonds hereinbefore mentioned, or any other securities of the estate, &c., &c.

On the 17th May, 1852, the defendants, John Dey and his wife, filed their joint and several answer.

They admit the will, its proof, and the appraisement and inventory filed—that the debts due the estate were appraised at two thousand four hundred and thirty-eight dollars and forty-seven cents, and the personal estate other than said debts, amounted to eight hundred and forty-seven dollars and twenty-five cents.

They allege that there was a mistake made in taking the inventory—that the inventory contains two notes of John A. Hopper, one for one hundred and sixteen dollars and eighty-five cents, and the other for three hundred and seven dollars and fifty cents, whereas there was only one note, amounting, with interest, to three hundred and forty-four dollars—that H. afterwards paid the executrix the interest due on this note, and gave the executrix a new note for three hundred and forty dollars.

They set out several large payments made on account of the estate, and Hannah (the executrix) then admits, that



all the rest of the estate came to her possession, and under her control, except such articles as were consumed and used in the family, and for their support, and a cow set off to Silas—one cow set off to Elijah—one horse set off to Albert —one cow, bed and bedding, set off to Catherine Ann Crane, and twenty dollars in money paid her—one horse sold to John Dey, and one of the cattle and one of the sheep which died of disease.

Admit the receipts of the rents and profits of the real estate, and that the defendant, Hannah, has the title deeds.

The answer sets forth that the complainant, Catherine Ann, when seventeen years of age, secretly married the complainant Crane, and that she and husband lived with her (the executrix) from February until May, and that then the bed, bedding and cow were set off to her—that she lent them another cow for a year, supplied the family with grain and flour, and kept the two cows for them.

The executrix, by the answer, further sets forth, that Silas and Elijah, two of the children, remained with and were supported and educated by the mother from their father's death until the autumn of 1847, when she, said executrix, removed temporarily to Newark, and took with her Albert, James and Martin, and maintained and supported them and provided them with board, clothing and education —that she then returned with them to Morris, and has educated and maintained them up to the time of filing the answer. She insists, that in taking the account of the estate, and the amount due to Daniel Crane and wife, and to Elijah, Silas, James, Albert, and Martin, respectively, the true value of said care, support and maintenance should be ascertained, and allowance made therefor from their respective shares.

The defendants state that the executrix has expended fifty dollars in money in settling the estate, which should be allowed, together with one hundred and fifty dollars as commissions.

The defendants further allege, that the goods and chattels, and all the personal property in the inventory men-



tioned, other than debts due and owing, still remain in specie upon the premises, and in the possession of executrix, except the portion consumed in the use, and that stated as set off to the children, and the cattle and sheep that died from disease, and the horse sold to Dey; and they insist that the residue thereof and the said personal estate in specie, ought to be taken at the full value, as stated in the inventory, and the residue sold, and the proceeds taken in full discharge, &c.

The defendant, Hannah, states that she employed John Dey (now her husband) to manage and till the farm, at ten dollars per month, and he was so employed from the year 1844 until 1850; that on the 11th February, 1850, a settlement was had, for which, up to that time he had received only about one hundred and twenty dollars, of which the horse before mentioned made seventy dollars—that upon the settlement, there was found due him five hundred and sixty dollars, and that towards the payment of that sum, the defendant, Hannah, as executrix ,transferred to him the Hopper note, then amounting to the sum of three hundred and fifty-five dollars and thirty cents, also the bond of Samuel Day, then amounting to the sum of one hundred and three dollars and fifty-eight cents, and that the executrix ought to have this allowance against the estate generally, or against the respective shares of Silas, Elijah, James, Albert and Martin.

The defendant, Hannah, denies squandering the estate, or threatening to do it, or of converting any of the estate to her own use, contrary to the will, and declares she is, and always has been ready to account, and is ready to account for the Hopper note, the Dey bond, and the horse, if it is right she should do so, and has repeatedly offered to some of defendants to account for the estate to their satisfaction—that the estate is well invested on interest.

The defendants deny ever having refused to deliver up the title deeds, or to account for the estate.

John Dey denies he has any of the estate except the Hopper note and Dey bond—that he received the same in

good faith, for the consideration stated, and without the knowledge that it belonged to the estate, and he insists on his right to retain them; he denies having received any of the rents and profits, but admits he has worked and lived upon the said lands, but without any compensation therefor than his living and support out of the same. He denies ever having had, as charged in the bill, a note or bond of Van Duyne, or the note or bond of Young, or the note of Everett or of Vanness; but he admits that after his marriage, the said Hannah, in making a change of the securities, the same were executed in the name of the defendant, John Dey, but the same remained in the possession of his wife.

The defendant, Hannah, answers, that the bond and mortgage of Van Duyne, the bond and mortgage of Young, the bill of sale of Everett, and the note of Vanness, were given as securities for moneys loaned by her, and which was her own money, and no part of the estate, earned by her from the use of the estate in part, and from her own industry since the testator's death.

To this answer is annexed a schedule of account containing the charges and discharges of the executrix.

Mr. *Little* argued for the complainants, and cited *Covenhoven and others v. Schuler and others*, 2 *Paige*, 122; 1 *Story's Eq.* sec. 604 (note); *Debo v. Titus*, 5 *Hal.* 129.

Mr. *Chandler* for defendants, Dey and wife, cited, *Wilkes and wife v. Rogers and others*, 6 *Johns. R.* 566; *In the matter of S. F. Bostwick*, 4 *Johns. Ch.* 100; *Allen v. Coster*, 17 *Eng. Ch. Rep.* 204.

THE CHANCELLOR. There is no difficulty in the construction of the will. The widow was entitled to the *use* of the real estate during her life, if she remained unmarried. If she married, her interest then terminated. Of the personal estate, a legacy of four hundred dollars was first to be paid out of it to the testator's eldest son, Stephen Van Duyne,

and the use of the residue was given to the widow on the same terms that she was to enjoy the real estate. At her death, or if she married, then at her marriage, all the real estate, and the residue of the personal estate, were to be divided equally among all the testator's children, being seven in number.

The defendants, John Dey and Hannah his wife, must account. The only questions involved in the case, which are in controversy between the parties, are, as to some principles applicable in taking the accounts. The complainants, not having put the facts alleged in the answer at issue, they must be taken as true.

The bill alleges, and the answer admits, that Stephen Van Duyne, the executor named in the will, has not intermeddled with the real estate, and that no part of the personalty came to his hands, or within his control, except the sum of four hundred dollars, and which he was entitled to as his legacy.

The defendant, Hannah, the executrix of the will, intermarried with John Dey on the 20th of February, 1850. They admit that since then, they have been in the actual possession of the larger portion of the real estate, and have received the rents from the persons occupying the residue. They must account for the rents and profits of all the real estate of which the testator died seized, since the 20th of February, 1850.

In taking this account, they claim an allowance for improvements put upon the estate by the defendant, Hannah, during the period between the death of the testator and her marriage, and for money paid for the tillage, care and culture of the land.

They are not entitled to such allowance. As to the improvements, they might have been proper and necessary for the full enjoyment of the estate, and doubtless have contributed to its permanent value. But the devisee terminated her estate by her own will. By the terms of the devise, she was entitled to the real estate during her life, if she remained unmarried. She accepted the estate, in lieu of her dower, upon the conditions annexed to it. There is



nothing in the case, which, as a matter of equity, entitles the defendants to an allowance for the improvements.

As to the moneys expended for the care and culture of the land; such expenditures were made for the devisee's own benefit. She occupied the land, and for the moneys expended in its care and cultivation, enjoyed its products. She was entitled to the use of it, but not to cultivate it at the expense of the children.

In accounting for the personal estate, the defendants are entitled to have the mistake, as to the Hopper note, which is alleged to have been made in taking the inventory and appraisement, corrected, without further proof. The circumstances of the mistake are set out in the answer, and the defendants offer to prove the error. The complainants have not afforded them an opportunity of doing so, by putting the facts affirmed by them in issue by a replication. Taking the circumstances stated as true, the mistake is apparent.

The payment made to Kitty De Hart, and the amount paid as a compromise to Anthony Young, under the facts stated in the answer, are proper for allowance, as likewise the sum of money paid to John Van Wagoner.

The defendants claim an allowance for one cow set off to Silas Van Duyne, one cow to Elijah, one horse to Albert, and a cow, bed and bedding, set off to Catherine Ann. The only objection to these allowances, is in the fact that these children were under age at the time they respectively received the property. The property was left by the testator, and is contained in the inventory and appraisement. The defendants being entitled to the full benefit of their answer, it is to be conceded that the advances were made to the children in good faith, and that they have had the full benefit of the property. Under these circumstances, it appears to me equitable, that in taking the accounts, these children should be respectively charged with these articles.

The defendants claim a further allowance of five hundred and sixty dollars paid by the executrix to John Dey, previous to their marriage.

The answer in reference to this claim states—that after the testator's death, it was necessary that some one should be employed to take charge of the real estate, and cultivate the land—that she employed Dey for this purpose, at a price of ten dollars a month, and that his wages amounted to the sum of five hundred and sixty dollars, which she paid him, by selling him a horse belonging to the estate, valued at seventy dollars, and the residue in obligations which came into her hands as executrix. I have already stated, that the executrix had no right to appropriate the property for any such purpose. Dey insists, that the obligations having been transferred to him *bona fide*, and for a valuable and ample consideration, and as he did not know, at the time of their transfer, that they belonged to the estate of the testator, he has a right to retain them as his own. If he was otherwise, a stranger to this suit, the fact of his having received the obligations without the knowledge of their belonging to the estate of the testator, might perhaps protect him. But he is made a defendant in this suit, not because the obligations were transferred to him, but because he is the husband of the executrix, and as such, must be held accountable with her, as long as the coverture lasts, for all the property which came to her possession as executrix, no matter whether it came to his hands or not. "If a *feme sole*, being an executrix or administratrix, wastes the goods of her testator or intestate, and then marries, her husband is liable, as long as the coverture lasts, for the *devastavit*." (2 *Williams on Executors*, 1128, *and note L; Knox v. Picket*, 4 *Desaus. R.* 92; *Moon v. Henderson*, 4 *Desaus. R.* 459.) The defendants must be charged with the five hundred dollars.

The defendants further claim an allowance for the executrix, for the care, support, and maintenance of the children during their minority, and from the testator's death to the time of the marriage.

The executrix, as the mother of these children, was under a moral obligation to maintain and educate them, and to devote her property and industry for the purpose. It is true, where children have a separate estate from their mother, a



court of chancery has the power, and will, in a proper case, make an order for an allowance out of their own estate for their support and education; or will, in the settlement of the accounts, allow for such past expenditures, although made without an order of the court. In the case of *Wilkes and wife v. John Rogers and others*, 6 *Johns. R.* 566, which was then decided on an appeal from the chancellor, the chancellor had decided, that the charge for the maintenance and education of the children, made in that case by the executrix, who was their mother, could not be allowed, because the charge was not deduced from a previous order, and the chancellor, in his opinion, cites the numerous authorities applicable to the subject. But the Court of Errors reversed the chancellor's decision, and decided that the mother was entitled to be allowed, out of the portion of the estate belonging to the children for their maintenance during infancy. But in that case, the judges in their opinions admit, that such allowance is not in accordance with the general rule. But the circumstances of that case made it an exception to the rule.

But what propriety or equity would there be in such allowance in the case before us? The father of these children placing implicit confidence in his wife, and believing that the interest and care of his children could be safely committed to her, secured by a mother's affections, had not left them, by his will, anything to supply their then present wants. The use of all his property, except a legacy of four hundred dollars, he gave to his widow. This, with some property she possessed of her own, proved amply sufficient for her own comfortable support and the maintenance of her children. She shows in her answer, that from this property she had been able, over and above supplying these necessities, to accumulate several hundred dollars. The intention of the testator was, that with the use of the property devised to his widow, she should take care of his children. It was never his intention that she should have the use of it for her own benefit, and a resort be had to the principal for the maintenance of the children.

As to the bond and mortgage of G. W. Van Duyne and that of Young, the bill of sale given by Everett, and the note of Vannest—taking the account given of them in their answer as true—they constitute no part of the estate.

Only one other question remains to be settled. The defendants state in their answer, that all the goods and chattels, and all the personal property mentioned in the inventory and appraisement, other than the debts therein mentioned as due and owing to the estate, still remain, in specie, upon the premises, except a portion thereof, which, from its nature, was consumed in the use, some live stock which died from disease, and the horse, cow, &c., transferred and delivered to the children, as before referred to. The defendants insist that they are entitled to an allowance for the property that was consumed in the use, and that perished, and that the residue must be sold, and an allowance be made the executrix for any deficiency there may be between the amount the property was appraised at and the sum it may bring at such sale.

The complainants, on the other hand, insist, that it was the duty of the executrix to have sold all this property when she assumed her duties as executrix, and to have invested the money so that she might have received the benefit of its income, and her children the principal, when, by the terms of the will, they should be entitled to it.

In the case of *Covenhoven v. Souler*, 2 *Paige Ch. R.*, 132, Chancellor Walworth says: "Whether a gift for life of specific articles, as of grain, hay, &c., which must necessarily be consumed in the using, is to be considered an absolute gift of the property, or whether they must be sold and the interest or income only of the money applied to the use of the tenant for life, appears to be a question still unsettled in England." (3 *Ves* 314; 3 *Mer.* 194.) But none of these principles in relation to specific bequests of particular articles, whether capable of a separate use for life or otherwise, are applicable to this case. When there is a general bequest of a residue for life, with a remainder over, although it includes articles of both descriptions as well as other

property, the whole must be sold and converted into money by the executor, and the proceeds must be invested in permanent securities, and the interest or income only is to be paid to the legatee for life. This distinction is recognized by the Master of the Rolls in *Randall v. Russell*, (3 *Mer. R.*, 193.)

These rules are all very well, where there is any doubt as to the intention of the testator. If we can ascertain that intention with any reasonable certainty, it must prevail over any technical rule. This bequest of the personal property included articles which, from their nature, would be consumed in their use, and of which the use and the property could have no separate existence. The testator left his widow with a large family of young children. He left her the *use* of all his personal property, except four hundred dollars, and the *use* of all his real estate. This personal property in question, was appropriate and necessary for the enjoyment of the real estate. It was used legitimately for that purpose, and these children enjoyed, with their mother, the benefit of it. Of some of it the use consisted in its consumption, and the residue was only depreciated in value by its use. The testator made the legatee his executrix, and placed the specific property in her hands. She ought to be called to a strict account for all this property, and I do not intend to lay down any rule by which she can escape. But I do not believe it was the intention of the testator that this property should be sold at his death. The executrix, when she made up her mind to marry, ought to have stated and exhibited her accounts, and put the estate in a condition for settlement, according to law. Her dealings with the man she intended to marry; the transferring to him of upwards of five hundred dollars of the property committed to her trust—her husband and herself remaining in the use of all the real and personal estate after her term and interest in it had expired; these circumstances do not incline me to extend any leniency to these defendants, in taking the accounts.

As to the property which was necessarily consumed in its actual use upon the premises, and the live stock which

perished from disease, an allowance must be made at their appraised value.

As to the residue, the defendant, Dey, and his wife, have converted it to their own use. There is no necessity of selling it. Having assumed the ownership of it, the defendants must account for it at its appraised value. The executrix might, under other circumstances, have been entitled to an allowance for its depreciation. The conduct of the defendants, in assuming the ownership of it after their marriage, must deprive them of this benefit.

Let it be referred to a master to take and state the accounts upon the principles laid down. In addition to the allowances before mentioned, let an allowance be made for moneys expended by the executrix, in the discharge of her duties, not to exceed fifty dollars, and a sum for commissions, not to exceed one hundred and fifty dollars. These sums are the extent of what she claims in the answer.

BENJAMIN SWAYZE, complainant, and JAMES SWAYZE, and others, defendants.

A bill which sets up distinct and different causes of complaint which destroy each other, and seeks different reliefs inconsistent with each other, is multifarious; and although no advantage be taken of the defect by the pleadings, the court may dismiss the bill, and will do it where the form of the bill embarrasses the court in the administration of justice.

The principle is familiar and well established, that in order to give a creditor a standing in the court, to enable him to question the conveyance of his debtor on account of fraud, he must have some lien on the property.

The only reason why the Court of Chancery interferes on behalf of a judgment creditor is, to remove the obstacle which has been fraudulently interposed to prevent the satisfaction of the judgment by due process of law. So where the judgment was no lien upon the land, and the complainant did not show that he had exhausted his remedy by execution, or any reason why he did not enforce his judgment against his debtor, but the bill showed that the debtor had abundant personal property to satisfy the judgment; after a delay of fourteen years, and after the debtor is dead, this court will not interfere on behalf of the judgment creditor to set aside a conveyance which had been made by the debtor, for fraud.

This cause was argued at Newark, December 7th, 1852, on the pleadings and proofs.

The bill charges, that in the year 1831, one Daniel Swayze was seized in fee of a farm in the county of Morris, of the value of five thousand dollars, and described in the bill, containing about one hundred and eighty-nine and sixty-eight hundredths acres.

That Daniel Swayze was the father of six children, to wit, the complainant, and the defendants, Isaac, James, Mary, Mehetable, afterwards wife of John Sliker, and Sarah, afterwards wife of Andrew Sliker.

That Isaac and James, on or about the 10th of July, 1831, induced their father to make them a deed in fee simple for the said farm, and that on that day D. S. and wife did execute to them such deed, purporting on its face to be for the consideration of two thousand dollars.

That at that time, the complainant was in the possession of the farm as tenant; that James and Isaac commenced an ejectment suit against him at September term, 1832, of the Supreme Court, and that he, the complainant, being poor, was obliged to give up possession.

That D. S., at the time he executed the deed aforesaid, was seventy-five years of age; that he was at all times a man of weak mind, and at the time of making the deed was incompetent to attend to any business whatever, and was unfit, on account of the infirmity of his mind, to execute the conveyance aforesaid.

That Isaac and James obtained the deed by false and fraudulent representations, and without any consideration.

That they represented to D. S. that the complainant had an unjust and illegal claim against him, and would sell his farm to pay it, and that if he would make a deed to them for the farm, they would either pay him two thousand dollars, or make him good security for it—would take care of him during his life—provide for his wants, and at his death make a division of the farm among the brothers and sisters, notwithstanding the deed.

That by means of these representations, D. S. made the deed to them.

That the representations so made were deceptive, false, and fraudulent.

That, at that time, the complainant had a just and legal claim against D. S., and which the said James and Isaac well knew, and they combined together to defraud the complainant out of his debt.

That James and Isaac never paid the two thousand dollars consideration money, or any part of it, or secured it; that they did not provide for him, but neglected to do it.

That since the conveyance, James and Isaac have occupied the land, and enjoyed for their own use the rents and profits.

That, at the time of acknowledging the deed, D. S. stated that he was induced to make the deed solely on the above representations; that no arrangement had then been made to secure him the two thousand dollars, and he was afraid

they never would; and D. S.'s wife, at same time, made like statements.

That the old man, during his life, frequently charged James and Isaac with having deceived him, and that they knew complainant's debt was just, and ought to be paid, and at one time, on such charges, or similar ones, being made, Isaac acquiesced.

That D. S. died about the 1st of August, and his wife the 1st October, 1841.

That, at his death, he left personal property of the value of five hundred dollars, and in money four hundred dollars; that he received a pension of fifty-six dollars and sixty-seven cents per annum, commencing on the 4th of March, 1831, and ending September 4, 1843, amounting in all to seven hundred and eight dollars and thirty-seven cents.

That Isaac and James, or one of them, was in the habit of receiving the pension money, and had a considerable part of it in their hands at the old man's death.

That Isaac and James received one hundred and eleven dollars of other moneys to which D. S. was entitled, from different individuals; that no letters of administration were ever taken out, and that Isaac and James took all his personal estate and converted it to their own use, and never accounted for any part to the complainant.

That I. and J. took possession of all the papers; that D. S. left no debts at his death except the one to complainant; that the complainant is the heir-at-law of D. S. to the one-sixth part of his estate, real and personal.

That D. S., at his death, was indebted to the complainant in the sum of three hundred dollars, for money paid for D. S., and at his request; in the further sum of one hundred dollars for work, labor, &c., and for goods, wares, and merchandize sold and delivered to him; in the further sum of one hundred and sixty-five dollars principal, costs, and interest due on a judgment recovered by complainant against D. S., before a justice of the peace of the county of Morris, on 21st September, 1835.

That Bethuel, one of the children and heirs of D. S. died

about 1st April, 1840, and the other children refusing to join as complainants in this bill, are made defendants.

The bill prays that the deed from D. S. to his sons may be set aside, and account taken of the rents and profits of the lands.

That an account may be taken of the personal property of D. S., that has come to the possession of the said I. and J., and full settlement of the estate be had, and the value of the lands be ascertained.

That an account may be taken of what is due to the complainant, and that a receiver may be appointed.

That the said lands may be sold, and that, out of the moneys so arising, the complainant may be paid the amount due to him from the said D. S., and that after the complainant has been paid said amount so due him, the complainant may receive his sixth part of the said real and personal estate.

And that the complainant may have such other relief, &c., &c.

The answer denies the equity of the bill.

In reference to the conveyance to them, the defendants state:

That their father was about seventy years of age, and from the natural abatement of his strength, was unable personally to attend to the proper cultivation of the farm; that he was embarrassed by debt which he had incurred both on his own account and that of complainant, to an amount of several hundred dollars, and was threatened with prosecution; that he became uneasy lest his property should be sold to pay his debts, and he complained of the complainant's (who then lived with him) not keeping the farm in order, and of his unkind treatment to him and his wife; that both the old man and wife frequently applied to them, and urged them to purchase, and keep it as a home for them.

That finally they agreed with their father to buy the farm on the following terms. They agreed, in consideration of a conveyance to them, to provide for their father, their mother, and their sister Mary Swayze, (who had always been afflicted

with imbecility of mind,) a comfortable maintenance and support for and during their natural lives. They further agreed to pay off their father's debts, and which debts, their father stated, would be about, as he supposed, three hundred dollars, but which amounted to about eight hundred dollars; they further agreed, that after the death of their father, they would pay their sister, Mehetable Sliker, one-third of the difference between the amount of their father's debts and the sum of one thousand dollars, the other two-thirds of that difference to be retained by and equally divided between the defendants, their father averring at the time that the complainant and Sarah Sliker had had more than their full share of his property.

That in pursuance of this agreement, the deed was made, and that they have faithfully performed their part of the agreement, which was the consideration of the deed; that they have paid off debts to the amount of about eight hundred dollars; maintained their father and mother during their lives, and have maintained their sister since.

That when they took possession, the farm was worn out. That they built two houses, in one of which their parents lived during their lives.

They deny the charge of their father's incapacity, and insist the consideration was an ample one.

They deny circumstantially any charge made in the bill of fraud.

They admit that, at his death, their father left some personal property, but of small value. They deny that any of it ever came into their possession, but say that it was taken by their sister, and claimed by her as having been given her by her father. They deny that their father, at his death, owned any money, or obligations, to their knowledge, and they do not believe he had.

They admit, their father received the pension, and that he expended it for his own support. They deny they ever had any of it to their own use.

They admit that no letters of administration have been

taken out, and that at the time of his death their father owed no debts.

They deny, according their best knowledge and belief, that their father owed complainant. They admit the judgment, but insist it was improperly obtained.

The complainant filed a replication, and proofs were taken on both sides.

The other defendants did not answer.

J. G. Shipman, for complainant.

T. Little, for defendants, James and Isaac Swayze.

THE CHANCELLOR. This bill is multifarious. It sets up distinct and different causes of complaint which destroy each other. It seeks different reliefs inconsistent with each other.

It asks for relief, on the ground that the complainant is a creditor, and that the real estate in controversy was conveyed to two of the defendants by the complainant's debtor, for the purpose of defrauding him. The decree that the complainant is entitled to in this aspect of the bill is, that the property is held subject to his debt.

But the complainant asks relief on another ground; that he is the heir-at-law of Daniel Swayze: that the two defendants, James and Isaac Swayze, of whose fraud he complains, procured the conveyance from their father, who was an old man, broken down by age, and not of sufficient mental capacity to transact business, by fraud and misrepresentations. The relief to which the complainant is entitled, in this aspect of the bill, is that the deed be decreed absolutely null and void, and the complainant, as one of the heirs-at-law of Daniel Swayze, entitled to the one-sixth part of the land and premises.

If the complainant is entitled to relief on the first ground, the conveyance, as between the parties to it, is valid; and it is valid against the complainant, as an heir-at-law, because



in this aspect, he stands in the same position as his ancestor, and can have no redress to which he would not have been entitled.

The different characters in which the complainant is prosecuting this suit, are, on account of the subject matters of the suit, inconsistent with each other.

The bill seeks relief upon another ground. It alleges, that the two defendants, James and Isaac Swayze, took possession, on their father's death, of all his personal property, of considerable amount; that no letters of administration have been taken out, and that the said defendants have refused to pay the complainant's debt, or distribute the property, according to law. The complainant asks that his debt may be paid, and that the defendants may account to him for one-sixth of the personal estate.

If the court could interpose for the relief of the complainant upon this latter ground, it is a case for relief which could not properly be joined in one suit with the other cases for relief embraced in the bill.

But although this bill is multifarious, no advantage has been taken of it by the pleadings, nor was the objection stated at the hearing. The objection must be taken by demurrer or plea, or be set up in the answer, and if it is not, the defendant cannot claim any benefit from such defect. But though the party may waive the objection, the court, *proprio jure*, may dismiss the bill, and will do it, where the form of the bill embarrasses the court in the administration of justice.

The conclusion I have reached on an examination of the evidence, enables me to dispose of the case without embarrassment, and there is no necessity, therefore, for the court's interposing, and dismissing the bill on account of the defect alluded to. I have noticed the form of the bill, that it may not be referred to as a precedent, and that no conclusion may be drawn, that the court will encourage laxity of pleading. Mere technicality should not be permitted, in this court, to interfere with the administration of justice, but looseness of pleading, which embarrasses a party in his defence, and

the court in determining the rights of suitors, and the relief to which they are entitled, ought not to be encouraged.

The complainant insists, that the deed was made by Daniel Swayze to his sons, James and Isaac, for the purpose of defrauding the complainant, who was a creditor.

This ground was pressed with much earnestness by the complainant's counsel, and he insisted, with great confidence, that the evidence was irresistible to establish the fraud. Admitting the conclusion to be correct as to the evidence on this branch of the case, is the complainant entitled to relief?

The principle is so well established, and is so familiar, that in order to give a creditor a standing in the court, to enable him to question a conveyance of his debtor on account of fraud, he must have some lien on the property, that it is unnecessary to cite authorities on the point.

The complainant, on the 21st of September, 1835, recovered a judgment, in a justice's court, against Daniel Swayze, for the sum of ninety-eight dollars and ninety-nine cents, and on the 24th of September, 1849, he files his bill in this court, and asks to have a conveyance, made by his debtor on the 10th of January, 1831, set aside for fraud.

This judgment, by the statute, was no lien upon the land, and the complainant does not show that he had exhausted his remedy by execution, or any reason why he did not enforce his judgment against his debtor. Indeed, the complainant shows by his bill that his debtor had abundant personal property to satisfy the judgment. Under these circumstances—after a delay of fourteen years, and after his debtor is dead, there is no propriety in the court's interfering on his behalf, even if his judgment was of a nature to warrant it.

The only reason why the Court of Chancery interferes on behalf of a judgment creditor is, to remove the obstacle which has been fraudulently interposed to prevent the satisfaction of the judgment by due process of law. But if this conveyance had never been made, the judgment could not have been enforced against this land.

In this aspect of the case, the complainant is not entitled to relief.

But the complainant further insists, that he is one of the heirs-at-law of Daniel Swayze, and, as such, is entitled to the one-sixth of his real estate; that, at the time of the execution of the deed, his father was aged and infirm in body and mind, and not of sufficient mental capacity to dispose of his property; that the grantees induced him, by fraud and misrepresentations, to execute the deed, and that, for these reasons, the conveyance should be declared void. But if the complainant has proved beyond a doubt, as his counsel insists, that Daniel Swayze executed the deed to defraud a creditor, such proof destroys whatever case the complainant may have had as an heir-at-law. If Daniel Swayze's purpose in executing the deed was to defeat his creditors, though the deed is void as to them, it is valid as between the grantor and grantees, and, of course, as between the grantor's heirs and the grantees. It is valid, then, against the complainant, as an heir-at-law of Daniel Swayze.

The evidence is not of a character to leave room to doubt but that Daniel Swayze, at the time he executed the deed, was of sufficient mental capacity to dispose of his property. It is true, he was an old man, and in body and mind, was suffering under the infirmities of old age. He had, up to this period, transacted all his own business—had considerable pecuniary dealings with his neighbors—and his friends who were in constant intercourse with him, and persons with whom he dealt, do not express a doubt as to his sufficient mental capacity to dispose of his property. Two or three witnesses, produced on behalf of the complainant, do express such doubts, but there are a large number of witnesses opposed to them, and such as were better capable, from many considerations, to give a judgment on this subject. The witnesses who express a doubt, give no reasons for their opinion, and allude to no circumstance, in the old man's conduct, to justify it. He lived for more than six years after the deed was executed. During that period there was no

unusual abatement of his natural vigor of mind or body. He retained his mental faculties until his death, impaired only by the ordinary infirmities of advancing age.

Nor is there any evidence to sustain the charge, that the deed was procured from the old man by the fraud and misrepresentations of his sons. The defendants, in reply to this charge, in their answer, deny it; and allege that it was at their father and mother's earnest and repeated solicitations, that they consented to take the deed, and that they took it with the view, not of speculation, but to relieve their aged parents. And they prove this by the declarations of their father, and of their mother, made in the father's presence, and under circumstances which entitle the defendants to the full benefit of the declarations. The evidence was objected to, but it is admissible. In the aspect of the case to which our attention is now directed, the complainant is claiming as an heir-at-law. He assumes the position of his ancestor, in impeaching the deed; and the same evidence which would be admissible if his ancestor were the complainant, is proper in this suit.

As an evidence of incapacity of the grantor, and fraud on the part of the grantees, it is insisted that the price of two thousand dollars was inadequate. The weight of evidence is, I think, very strong, that the price named was, at the time, the full value of the farm. It was the price fixed by the grantor himself in offering to sell the farm to strangers, and men of character, living in the neighborhood, acquainted with the premises, and good judges of the value of land, declare that two thousand dollars was the full value.

I think the evidence falls very far short of making a case of incapacity of mind in the grantor, or of fraud or imposition on the part of the grantees.

But the complainant takes another ground. He insists that the consideration agreed upon between the parties to the deed, has never been paid, and that the grantees must account for it.

I have not overlooked the fact, that this view of the case



was urged also as an evidence of the fraud, taken in connection with other circumstances of the case, and in examining the question of fraud, I gave to the complainant the full benefit that the evidence on this point, in my judgment, was entitled to.

As to the consideration of the conveyance: the complainant alleges in his bill, that no part of the consideration has been paid; that at the time the deed was executed, the defendants, James and Isaac, promised and agreed with their father, that they would take charge of the property for him, and would either pay him the sum of two thousand dollars, or else would give him good security for it; that they would take care of their father during the remainder of his life, provide for all his wants, and at his death would make a division of his lands among all the children.

These allegations are made in the bill, to show, in part, the means by which the old man was imposed upon, and to establish the alleged fraud; and, indeed, unless they are available to the complainant on the question of fraud, they cannot avail him at all. If the consideration money has not been paid, it remains a lien upon the land. But the complainant cannot recover it, or any part of it, in this suit. It belongs to the personal representative, and must pass through his hands in the administration of the estate.

But how stands the case, upon the evidence, as to this question.

The defendants, in their answer, state, in reference to the consideration, that they agreed to purchase the farm on the following terms: to provide for their father and mother, and their sister Mary, who lived at home, and who has always been afflicted with imbecility of mind, a comfortable maintainance and support during their lives; to pay and discharge all their father's debts, which, he supposed, would amount to three hundred dollars, but which, in fact, amounted to about eight hundred dollars; that, after the death of their father, they would pay to their sister, Mehetable Sliker, one-third of the difference between their father's debts and the sum of one thousand dollars. the remaining two-thirds of that differ-



ence to be retained by and equally divided between themselves.

The defendants show that their father was embarrassed, and without means to pay his debts and liabilities, except by a resort to the farm for the purpose, and that it was necessary he should either sell the farm to strangers, or make some family arrangement to relieve him from that necessity; that he was unkindly treated by his son, the complainant, and had involved himself in debt on the complainant's account; that his children had had their share of his property, except his sons James and Isaac, and his daughters Mehetable and Mary, and that he had declared the complainant should have no portion of his estate.

These facts the defendants prove by the old man's declarations. His declarations were admissible for this purpose, for, as has been stated, the complainant occupies the position of his father, and the same evidence that would have been admissable against him, is proper evidence against the complainant.

The defendants further prove, that their father and mother, during their lives, occupied a house on the farm; that they were comfortably maintained and provided for, and that it was the common understanding of the neighborhood that they were maintained by their sons, the defendants. There is proof, that the maintainance they received, was worth two hundred dollars a year, and that it was worth a hundred dollars to provide and take care of Mary; that she resided with her parents during their lives, and, since then, has lived with one of her brothers. She makes no complaint against the defendants, of not fulfilling their agreement, as far as she is concerned.

The defendants state, in their answer, that they paid debts of their father to the amount of eight hundred dollars. They produce, in their possession, evidences of debts paid, to nearly that amount. It is true, the proof of all these debts having been paid by them, does not come quite up to legal proof, but after the complainant's postponing his suit for fourteen years, it is unreasonable to expect of the defend-

ants that strict proof that would be required of them in reference to recent transactions.

There is evidence that the old man had some means of supporting himself from a pension he received from the general government, and that he used the money for that purpose. But there is nothing to warrant the supposition that he used the money from necessity, or because his sons had failed to provide for him, or shown a disposition to withhold anything that was necessary for the comfort of his household.

From a careful examination of all the evidence, I do not think there is anything in the case to warrant me in disturbing the deed.

The complainant's bill must be dismissed, with costs.



HENRY ALLEN, complainant, *v.* ISAAC COLE and others.

Where every allegation of fraud, charged in a bill filed to set aside a sheriff's sale, upon several judgments and executions by one of the judgment creditors, is met and denied by the answer, and the complainant has made no effort, by proof, to sustain the fraud, the defendants are entitled to the full benefit of their answer, so far as it is responsive to the bill.

If the advertisement of the sheriff sufficiently identifies the property to be sold, it is in compliance with the law. He need not describe the number of buildings or their character.

The adjournment of the sale need not be advertised in a newspaper. Public proclamation made at the time at which the sale was published to take place, is all that the law requires.

One who waits to see the result of a sale, allows property to be sold on his own judgment, as well as that of other judgment creditors; and when it turns out that purchasers have not been so unfortunate as to make a bad speculation, but rather have been lucky at the expense of the judgment creditors, then complains of the unfavorable circumstances under which the sale was made, and of frauds which demanded his prompt action to entitle him to be relieved of their consequences, is not entitled to the favorable consideration of the court.

The bill was filed August 22d, 1850. Its object was to set aside the sale of the sheriff of the county of Camden, upon several judgments and executions, and for a resale. It charged several of the judgments as fraudulent, and illegality in the sheriff in advertising the property and in conducting the sale.

The sheriff, T. W. M., and Isaac Cole, answered the bill. The other defendants did not answer. On filing the bill, the sheriff was enjoined from making deeds to purchasers. On the coming in of the answer, a motion was made to dissolve the injunction, which was refused.

The cause was now heard upon the pleadings and proofs.

A. Huff and *W. N. Jeffers* for complainant.

T. W. Mulford for defendants.



THE CHANCELLOR. Every allegation of fraud charged in the bill, is met and denied by the answer. The complainant has made no effort, by proof, to sustain the fraud, and of course the defendants are entitled to the full benefit of their answer, so far as it is responsive to the bill.

As to the manner in which the sale was conducted by the sheriff, his answer is perfectly satisfactory; and shows, that the suspicions entertained by the complainant, as to any improper influence exerted over the sheriff, either by Mr. Cole or by Mr. Mulford, are without any foundation whatever.

The advertisement of the sheriff was in strict compliance with the law. It sufficiently identified the property. The sheriff was not bound to describe the number of buildings, or their character. To compel a sheriff to do this would be oppressive, and oblige him to incur an expense for which the law provides him no remuneration.

The adjournment of the sale was not advertised in the newspaper. Public proclamation was made of the adjournment, at the time at which the sale was published to take place. It has been before decided in this court, (*Cox v. Halsted et al.* 1 *Green's Ch.* 316,) that this is all the law requires.

It may be true that some of the property sold below its value. Such a consequence might reasonably be expected to follow from the sale of property situated as this was, with incumbrances upon it to a large amount, and defects of title as to some of it in a course of litigation.

The time of filing his bill, does not entitle the complainant to the very favorable consideration of the court. If he had any foundation for many of the allegations of his bill, he should have asked the interposition of the court, prior to the sheriff's making the sale. But he waits to see the result of the sale. He allows the property to be sold on his own judgment, as well as that of other judgment creditors, and when it turns out that purchasers have not been so unfortunate as to make bad speculations, but rather, have been



lucky, at the expense of the judgment creditors, the creditor then complains of the unfavorable circumstances under which the sale was made, and of frauds committed which demanded his prompt action to entitle him to be relieved from their consequences.

But, as I said, the frauds are denied, and no attempt is made to sustain them.

The property was sold under fifteen judgments, amounting to upwards of seventeen thousand dollars. The complainant is the only creditor who complains of the sale. I have no good reason for supposing, from the evidence before me, that the property would sell any better if a resale was ordered, or that either the complainant, or any other creditor, would derive any benefit from it.

The bill must be dismissed with costs.



Between JASON ROGERS and JACOB S. ROGERS, complainanants, and CHARLES DANFORTH and others, defendants.

Where the complainants ask for an injunction to protect them *from apprehended danger*, and the answer denies that such apprehensions are well founded, the court, as a general rule, will give to the defendants the full benefit of such denial, and refuse the injunction; and when both parties come before the court with affidavits, the court will refuse the injunction, unless the complainants make out a very clear case by their bill and affidavits.

It would seem that a tenant may ask the aid of this court to prevent his landlord from breaking a covenant which, though not made with the tenant, will work a forfeiture of his estate.

It does not follow that because a suit at law cannot be maintained on such a covenant, a Court of Chancery may not protect the rights of parties under it.

It is no breach of a covenant which prohibits the erection of a forge or furnace *for the manufacturing of iron*, or the erection of any building for any such purpose, to erect buildings in which forges for the purpose of *heating iron*, and *moulding* and *working* it into different kinds of articles to be used in the construction of locomotive engines are intended to be used.

***A forge or furnace for the manufacture of iron*, has a definition comprehended and understood alike by scientific men and mechanics acquainted with the business; and in such cases the definition will control in the construction of the covenant.**

This was an application for an injunction, and was argued at February term, 1853, on bill, and the affidavits filed on behalf of the defendant. The state of the case sufficiently appears in the opinion of the Chancellor

A. B. Woodruff and *A. Whitehead* for the complainants, cited *Eden on Inj.* 238, ch. 9; 2 *Story's Eq. J.* § 959, b. note 1; *Broom's Maxims*, 266, 276, 300.

A. Pennington and *A. O. Zabriskie* for defendants, cited *Drewey on Inj.* 248; 2 *Eden*, 269.

THE CHANCELLOR. In filing this bill, an application was

made for an injunction. An order was made for the defendants to show cause, on a day named, why an injunction should not issue in pursuance of the prayer of the bill. The defendants put in several affidavits, which were read without objection, and the motion was argued by counsel on both sides on the bill, and the affidavits filed on behalf of the defendants.

"The Society for Establishing Useful Manufactures," at Paterson, in 1827, leased for twenty-one years, with a covenant for renewals, to James Shephard, a lot of land with a specified quantity of water for manufacturing purposes.

Charles Oliver became the owner of the interest of the society in this lease, and of their reversionary interest in the demised premises.

In 1848, Oliver renewed the lease to Shephard for twenty-one years.

Among various covenants contained in the lease was one, that the lessee, his executors, administrators, or assigns, should not use, or suffer, or permit to be used, or employed, the said demised premises, or any part thereof, nor the water rights and privileges thereby given, or any part of them, at any time during the continuance of the lease, for the purpose of carrying on any manufacture of gunpowder, vitriol, spirits of turpentine, paints, varnish, tanning of leather, or as a pottery, or distillery of any kind, *or as a forge, or furnace, for the manufacturing of iron*, or copper, or for the erection of any buildings for any such purpose.

In 1848, Oliver renewed the lease to Shephard for twenty-one years, containing a like covenant with the one before referred to.

In 1831, Shephard leased a part of the demised premises to Peter Walker. This lease contained covenants on the part of the lessee similar to those from Shephard to Oliver. The right of renewal was also secured.

By diverse mesne assignments, the complainants became the assignees of Walker's interest in the lease, in 1849.

The complainants being thus entitled to the renewal, in 1849, an indenture between Shephard and the complainants

was executed for the purpose. This last indenture does not contain the covenant before recited.

In 1852, Shephard sold and assigned all his interest in the demised premises to Danforth and Edwards, two of the defendants. In the indenture of sale to them, Danforth and Edwards covenant with Shephard, to keep and perform all the covenants, on the part of Shephard to be kept and performed, in and by his lease from Oliver.

Thus it appears, that of the demised premises originally leased by the society to Shephard, the complainants, by subleases and renewals, are in the enjoyment and possession of a part of the same, and that Danforth and Edwards are in the enjoyment and possession of the residue.

By these several assignments and renewals, Danforth and Edwards, the defendants, have become the immediate landlords of the complainanants, while the defendants, as well as the complainants, hold under the original lease from the Society to Shephard.

There is erected on the complainants' lot, and occupied by them, an extensive and valuable cotton mill, which has been in operation for a number of years.

The bill alleges, that Danforth and Edwards, with the other defendants named, who are their partners, are erecting on their lot extensive buildings for the purpose of carrying on therein a large factory for the manufacture of locomotive engines, and other kinds of machinery, in which iron is the principal ingredient, and in which manufacture, the working and manufacture of iron, by means of forges or furnaces, constitutes a principal and much the largest branch; that the said building will be within a few feet of the complainants' cotton mill, and the forges and furnaces put therein and used, will be dangerous to the cotton mill, subjecting it to imminent risk of fire from the sparks and cinders escaping from the forges and furnaces; and that the smoke and cinders will greatly annoy the workmen in the cotton mill, and that such manufacturing establishments as the defendants contemplate erecting and carrying on, will be a nuisance.

The complainants ask for an injunction.

First. On the ground that the defendants' contemplated erections will endanger the safety of the cotton mill, and will annoy the complainants' workmen therein; and that upon the principles on which the jurisdiction of this court is exercised to prevent private nuisances, the complainants are entitled to the protection of the court.

Admitting, that if the allegations of the bill are true respecting the effect of the defendants' erections, a case is made that will entitle the complainants to an interference of this court on their behalf, by injunction; yet this part of the case is fully met by the answer of the defendants, and the affidavits accompanying it.

Whether or not the apprehensions of the complainants are well founded as to the danger and annoyance against which they seek protection, must depend, in a great measure, upon the manner in which the defendants' buildings are erected, and the work carried on.

The defendants say, in their answer, that the building, which they intend to use as a blacksmith shop, and in which they expect to have all their fires, is about twenty-eight feet distant from the complainants' mill, and that it is the intention of the defendants to erect the standing places for their fires, in such a way as to lead under ground by flues from each fire to one large chimney, which is to be eighty feet high from the surface of the ground, and that they intend to use mineral coal for these fires; that this chimney will be at least seventy-five feet distant from the cotton mill, and that the defendants do not intend to have any chimney except this large one; and they believe, with these constructions and protections, the complainants' mill will be in no danger from fire, nor will their workmen be annoyed by any cinders or sparks.

John Colt, in his affidavit, says—that he has seen a large blacksmith shop, with a great many fires, erected with a large chimney, and each fire communicating under ground with the chimney; that the shop was entirely free from smoke, and that there was not the least danger, or inconvenience, to any body from it; and that he is satisfied, such



an erection would be free from every objection, and that at a distance of fifty feet from a mill, it would not be more dangerous than a dwelling house there erected, and that with the use of mineral coal, no sparks would ever be seen coming out of the chimney.

William Swineburn corroborates Mr. Colt's statements, and forms his opinion from having seen such works in actual operation.

He says, they are no inconvenience to any one, when erected in this way; and that a large blacksmith shop so erected, with a great many fires, when the chimney is from sixty to eighty feet high, is as free from danger to the surrounding buildings, and from smoke, sparks, or cinders, as a chimney to an ordinary house is to those living on the opposite side of the street. Mr. Swineburn is a manufacturer who has been connected with manufacturing establishments similar to those contemplated by the defendants; and from the experience he has had, and from his opportunities of judging, his opinion is entitled to great consideration.

The defence, thus made on the part of the defendants is, I think, sufficient to overcome the mere apprehensions of the complainants, which is all they present for the court to act upon.

Where the complainants ask for an injunction to protect them from *apprehended* danger, and the answer denies that such apprehensions are well founded, the court, as a general rule, will give to the defendants the full benefit of such denial, and refuse the injunction; and where both parties come before the court with affidavits, the court will refuse the injunction, unless the complainants make out a very clear case by their bill and affidavits.

But there is another ground on which the complainants insist they are entitled to the injunction.

In the lease from Oliver to Shephard, there is a covenant, which I have before mentioned, by which the lessee is restricted from the use of any of the demised premises *for the purpose of a forge, or furnace, for the manufacturing of iron*

or copper, or for the erection of any building for any such purpose.

The complainants insist, that they are entitled to protection under this covenant, and that it prohibits the erection of any such buildings or machinery as are contemplated by the defendants.

The titles, of both complainants and defendants, are held under Charles Oliver, and are subject to the covenants in the lease from Oliver to Shephard. By this lease, the lessee's estate is forfeited by a breach of the covenant by him or his lessees. By the several assignments, before referred to, the defendants have become the landlord of the complainants. The latter have, therefore, a right to look to the former for protection. If the defendants violate this covenant, the estate of the complainants, their tenants, is forfeited. The tenant is asking the aid of the court to prevent his landlord from breaking a covenant, which, though not made with the tenant, will work a forfeiture of his estate.

It was rather conceded on the argument, that the complainants are without remedy at law against the defendants on this covenant; and for that reason, it was insisted, the complainants have stronger grounds for invoking the aid of a court of equity. Whereas, on behalf of the defendants, counsel urged, that if the defendants have no rights at law under the covenant, they can have no protection in equity.

It is clear that the complainants cannot maintain an action at law on this covenant, in their own name. But may they not maintain an action in the name of the covenantee, and be protected by a court of equity in the use of his name, if necessary? But whether this be so or not, I do not think it follows, that because a suit at law cannot be maintained on the covenant, a Court of Chancery may not protect the rights of parties under it.

In the case of *Barrow v. Richard and others*, 8 *Paige Ch. Rep.* 351, one Mercein owned a block of land in the city of New York. He divided it into lots, and sold them to different individuals. The grantees covenanted, respectively, against the erection of a certain description of buildings.

On a bill filed, by one of the grantees against another, it was held—that the covenants in the deeds of the different lots were for the mutual benefit and protection of all the purchasers of lots on the block; and although a previous purchaser from the owner of the block could not sue at law, upon the covenant in the deed to a subsequent purchaser, the Court of Chancery might protect him, by injunction, against the erection of buildings prohibited by the covenant. This would seem to conflict with the decision in the case of *The Duke of Bedford v. Trustees of the British Museum*, 2 *Sugden on Vendors*, *App.* 361, where in a case involving the same principle, the Vice-Chancellor sent the case to a court of law. Lord Elden decided the party had no relief. The reasons for his conclusion are not given.

But admitting that the complainants are entitled to the benefit of the covenant; it cannot avail them, unless it be made to appear, that the buildings and machinery the defendants propose erecting, are of a character prohibited by the covenant.

The covenant is, that the lessees should not use, on the demised premises, or suffer a forge or furnace for the manufacturing of iron.

The defendants admit, that they intend to use, in their buildings, forges for the purpose of heating iron, and moulding and working it into different kinds of articles to be used in the construction of locomotive engines. They deny that such forges, are forges for the *manufacturing* of iron, as contemplated by the parties to the covenant.

On behalf of the complainants it is argued, that the evil to be guarded against was the working of iron in fires, and to prevent filthy trades in the neighborhood of cotton mills.

These lots were laid out, originally, for manufacturing purposes; a canal is cut, bounding them on one side, and intended to supply water to drive machinery. It was not intended to restrict the use of the lots to the erection of cotton mills. To have restrained the lessees from the use of fires, to mould and work iron, for mechanical objects, would have been putting a restraint upon the purposes to which



the property was eminently adapted, and the tendency of which would be, necessarily, to diminish the value of the property.

If the restraint was against the lessees erecting a *forge* or *furnace*, the complainants' construction of the covenant would, I think, be the right one. But the covenant does not prohibit the erection of a forge or furnace, but of a forge or furnace *for the manufacturing of iron*, or copper, *or the erection of any building for any such purpose.*

What is the definition of *a forge or furnace for the manufacturing of iron?* For, if there is a definition comprehended and understood, alike by scientific men and by mechanics acquainted with the business referred to, such definition ought to control the court in its construction of this covenant.

What is such a forge or furnace? An establishment, or mechanical contrivance, by which iron is made, or manufactured from the ore. A forge manufactures, or makes *malleable* iron direct from the ore. A blast furnace makes *cast* iron direct from the ore.

From what is iron manufactured? It is manufactured from the ore. By a blacksmith's forge iron is not manufactured. But, by it, from iron itself, machines or instruments of use, are manufactured.

It is not the intention of the defendants to erect any forge or furnace for the manufacture of iron. Their object and intention is not to make iron, but to use iron when made, to be worked up into different materials.

I do not think that the erection of the buildings and apparatus designed by the defendants, will be a breach of the covenant in question.

The motion for an injunction is denied with costs.



AARON V. BROWN, complainant, and JOHN R. HOLCOMB and JOHN G. READING, defendants.

If a debtor makes an assignment for the benefit of his creditors, such assignment must be in conformity to the statute. He has no right to give a preference of one creditor over another, nor has he a right to annex to such assignment a condition which contravenes any provision of the statute.

The assignee cannot protect the property from the debtor's creditors, by virtue of such an assignment. If an assignment is made *for the equal benefit of the creditors*, the assignee must proceed to discharge its trusts in conformity to the provisions of the statute.

But where, at the request of some of the creditors, the books of account, notes, &c., were placed in the hands of a responsible person *to collect*, and for no other purpose; such an assignment was held to be no more than a power of attorney. It did not place the property beyond the control of the debtor; it created no right between the assignee and the creditors. There was nothing illegal in such assignment, nor could it prejudice the creditors.

This cause was heard on bill and answer. The material facts contained in them are fully stated in the opinion of the Chancellor.

Allen for complainant.

P. J. Clark for defendants.

THE CHANCELLOR. The bill alleges, that one of the defendants, John R. Holcomb, and the complainant, were partners in trade as merchants or storekeepers, and that on the first of March, 1851, they dissolved partnership—that a short time after the dissolution, on the application and proposition of the complainant, an arrangement was made between them, in pursuance of which, the complainant assigned to Holcomb all the assets of the late firm, and thereupon Holcomb executed and delivered to the complainant, Holcomb's own bond, in the sum of five hundred dollars, with the col-

lowing condition:—"Whereas, the above named Aaron V. Brown, has this day assigned and set over to the said John R. Holcomb, the books of account of the late firm of Holcomb & Brown, to enable him to pay the debts and liabilities of said firm, and also the notes, bonds, vouchers, and other securities for the same purpose. Now the condition of this obligation is such, that if the said John R. Holcomb shall indemnify and save harmless the said Aaron V. Brown from the payment of any of the debts and liabilities of said firm, then this obligation to be void, otherwise to remain in force and effect."

The bill alleges, that since this arrangement, Freeman & Davis, creditors of the late firm of John R. Holcomb & Co., have recovered a judgment, and that by virtue of an execution issued thereon, a levy has been made upon the goods and chattels of the complainant; that Holcomb has become insolvent—has confessed a judgment to his father for fifteen hundred dollars, and has incumbered his real estate for more than its value—that since then, he has made an assignment to the other defendant, John G. Reading, of his individual personal property to a considerable amount, and also of the assets of the late firm—that it is a special assignment, for the benefit of such creditors only, as will take such sum as he chooses to offer them, in full satisfaction of their debts.

It is alleged, that this assignment was made for the fraudulent purpose of delaying and defeating the creditors, and is in contravention of the act "to secure to creditors an equal and just division of the estates of debtors, who convey to assignees for the benefit of creditors."

It is unnecessary to refer further to the contents of the bill, as the merits of the case are not affected by any other of the allegations contained in it.

The prayer of the bill is, that Reading may be decreed to pay the debt of Freeman & Davis, and such other judgment creditors as may apply for the purpose—that the assignment may not be kept on foot, or used, to delay, hinder, or defraud the judgment creditors of the late firm, and that a receiver may be appointed, &c.

The court will not interfere, unless it is necessary to do so, in order to protect the rights of the complainant. In decreeing relief to the complainant, it might follow, as incidental to such relief, that the judgment creditors of John G. Holcomb & Co., would be protected. But such is not the primary object of this bill, and for such a purpose the proper parties are not before the court. The complainant must be entitled to relief on his own account, or the bill cannot stand.

It is manifest, that the equity upon which this bill rests, is, that the complainant is entitled to the protection of the court, against the consequences to him, of the assignment from Holcomb to Reading. If we strike the assignment out of the bill, the complainant has nothing to stand upon.

The complainant voluntarily placed all the assets of the firm in the hands of his partner. He relinquished all control over these assets, and took from his partner a bond of indemnity for protection. Holcomb has a right to these assets, and this court will not interfere with his management of them, as between the complainant and him, unless he is taking advantage of his control over them to defraud the complainant.

The insolvency of Holcomb is no ground for relief. It does not follow, that because he is insolvent, he is therefore dishonest. The defendant can manage and settle up the affairs of the late firm, better than it can be done by any stranger appointed by the court, and I cannot interfere with him, unless I can see that he is acting dishonestly.

The case is before me on bill and answer, and the answer must be taken as true.

The answer denies the equity of the bill. It denies the fraud charged, and explains every allegation made imputing fraud; and the explanations given are consistent with honesty.

An assignment, such as the bill alleges to have been made, would have been illegal. It would have been void as against creditors. If a debtor makes an assignment for the benefit of his creditors, such assignment must be in conformity to the statute. He has no right to give a preference of one

creditor over another, nor has he a right to annex to such assignment, a condition which contravenes any provision of the statute. The assignee cannot protect the property from the debtor's creditors by virtue of such an assignment. If an assignment is made for the equal benefit of the creditors, the assignee must proceed to discharge its trusts in conformity to the provisions of the statute.

The defendant denies that he has made the assignment alleged in the answer, or that he has made any assignment for the benefit of creditors. He says, that some of the creditors applied to him, and said it would be more satisfactory to them, if he would place the books of account, notes, &c., in the hands of some responsible person to collect; and that to comply with their wishes, he placed them, by assignment, in the hands of Mr. Reading for the purpose, and with power to collect the same, and for no other purpose. Such an assignment was nothing more than a power of attorney. It does not place the property beyond the control of Holcomb. It created no rights between the assignee and the creditors, and there is nothing illegal in such assignment, and nothing to prejudice the creditors, or the complainant.

The defendant, Holcomb, further states, that the property, together with his own individual property, is not sufficient to pay all the creditors in full, and he admits, that it is his intention to offer a rateable proportion to all the creditors, and to pay such of them as are willing, on receipt of such proportion, to give a full discharge from their claims; and as to such as refuse to give such discharge, he intends to leave them to their legal remedy, but in no way to protect the property against their claims and legal remedies. But this forms no part of the assignment to Reading. It is a mere resolution, or determination, he has formed in his own mind.

I do not see any thing illegal or fraudulent in this. A debtor, may with propriety and honesty, where he finds himself insolvent, say to a creditor, "I will give you your fair proportion of my property. I will not *prefer* you. If you take my offer, well; if not, there is the property: take such

preference as the law will give you, but I will not prefer one creditor over another.

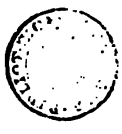
This is all Holcomb has done. Freeman & Davis have recovered a judgment. He says he has not property enough to pay them. He denies that he has placed the property beyond their reach as creditors, and he shows that it is within the reach of their judgment and execution. They have chosen to levy on the goods of the complainant. No action of the court, in this bill, would afford to the complainant any relief in respect to the execution of Freeman & Davis. They would sell the complainant's property still, and have a right to do so without being interfered with by the court.

But the complainant's counsel says, that notwithstanding the denials of the answer, the defendant's conduct is suspicious, from his own statement of the facts, and that there is still something concealed about the assignment to Reading, and that the defendants' answer is equivocal in regard to it.

But the complainant has not replied to the answer, and has therefore denied to the defendant an opportunity of proving his defence. He has not excepted to the answer for insufficiency. If, under such circumstances, he sets down his cause for final hearing upon bill and answer, he must concede to the defendant the benefit of his answer.

As I have already said, the equity of the case rests upon the simple point, whether or not the assignment to Reading was a conditional or illegal one. The defendant has denied that it was, and has denied the facts from which such an inference is to be drawn. The complainant has not taken issue upon the point, and the answer of the defendant is entitled to full credit.

The bill must be dismissed with costs.



GEORGE VAN RIPER, complainant, and ROGER CLAXTON and WIFE, defendants.

Where the defence set up by the answer is of a character to require the complainant to make a new issue in order to meet it, he will not be permitted to do so without amending his bill, and adapting it to the case upon which he expects to sustain himself.

The consideration of a mortgage was for a loan of money; and the defendant insists that the money was not advanced pursuant to the agreement, and the complainant meets that issue, but in doing so, attempts to show that if the money was not advanced in pursuance of the letter of the agreement, the advancement was sanctioned by the defendant.

Held, that as the whole case was before the Chancellor upon the proofs made by the defendant himself; it would be too technical to turn the complainant out of court. If the defendant be entitled to the benefit of the objection, the court has the power, and has frequently exercised it, of allowing a bill to be so amended as to correspond with the case, even after proof taken.

This is a case which would warrant the exercise of the power, if such a course were necessary.

This cause was argued at Newark, December 8th, 1852, on bill, answer, replication and proofs. The opinion was delivered February term, 1853. The pleadings and nature of the case upon the proof, sufficiently appear in the opinion of the Chancellor.

A. S. Pennington for complainant.

D. Barkalow for defendant.

THE CHANCELLOR. The bill is an ordinary foreclosure bill. It alleges, that the mortgage was given, and executed by the defendants to the complainant, to secure the payment of a bond in the penal sum of sixteen hundred dollars, conditioned to pay eight hundred dollars, given by Claxton, the defendant, to the complainant, and that the consideration of the bond was money loaned by the complainant to Claxton.

The defendant, Claxton, admits the due execution of the bond and montgage, and sets up this defence. He denies, that the complainant loaned him any money, but alleges, that the bond and mortgage were executed upon the following agreement. That he (Claxton) being desirous of erecting a dwelling house on the lot of land embraced in the mortgage, entered into a written agreement with one Garrison, to build it; that he was induced to let Garrison have the job of building the house, on the promise of the complainant, that if he would do so, the complainant would loan him the money; that it was agreed between the complainant, the defendant, and Garrison, that the complainant should advance the money for Claxton, to Garrison, for building the house, as follows: one hundred dollars on signing the building contract, and the balance, from time to time, as the building should progress, on receiving the order of George W. Hughes, who had the supervision of the work—that of the eight hundred dollars, the complainant should pay Hughes one hundred and nineteen dollars, which sum, Hughes had advanced for Claxton, as the purchase money for the lot—the balance of six hundred and eighty-one dollars to be paid on the building contract, as before stated.

The answer further states, that when the contract was signed, the complainant paid Garrison, on the order of Hughes, one hundred and twenty-four dollars on the contract; but that Hughes has not at any time ordered or directed, or in any way assented to the payment of any other, or further sum of money, on account of the contract, or for the defendant, Claxton, or on any account whatever.

The answer further alleges, that Garrison failed to use such materials, and do the work in the manner as by the contract it was stipulated, and that in consequence of such default, the defendant has been greatly damaged—that Claxton failed to pay for the work done, and materials furnished, and that by reason of such failure, claims against Garrison, for such work and materials, were filed under the lien law, in the county clerk's office, and are liens upon the premises; that the reason, why Garrison suffered the liens to be estab-

lished, was because he was indebted to Van Riper, and instead of Van Riper's paying him in money, and thus enabling him, by putting him in funds to pay for the work and materials, Van Riper credited him on the old debt.

It is first insisted, on behalf of the defendant, that he has proved clearly that no money was advanced to him by the complainant, at the time of the execution of the mortgage; and that the money, if advanced at all, was on the special agreement, and that the complainant, therefore, cannot recover upon the case made by the bill. The bill simply charges a loan of money, and the execution of the bond and mortgage, to secure its payment.

The case of *Hopper v. Scisco*, 1 *Hal. Ch. R.* 345, is relied upon to sustain this position. In that case, the complainant filed his bill in the form of an ordinary foreclosure bill, and set out the consideration of the debt secured by his mortgage, to be the loan of money. The defendant set up and proved, that the mortgage was given, as collateral security for certain judgments, obtained by different persons against Scisco, which had been assigned to the complainant, and which after the mortgage was given, were satisfied by sales on executions. The complainant then attempted to sustain his case, simply by showing, that at different times he had paid to the sheriff of the county, various sums of money on executions against Scisco, in the sheriff's hands. But the Chancellor very properly decided that the defendant was not called upon to meet such a case—that it was a surprise on the defendant, and that the matters attempted to be set up by the complainant were not at issue between the parties.

In the case before us, the substance of the agreement, upon which the mortgage was executed, was—that the complainant should loan the defendant eight hundred dollars, and instead of advancing all the money upon the delivery of the mortgage, it should be advanced as the defendant should demand it, or upon the demand of a person named as his agent for that purpose. Whatever money was so ad-

vanced, was a loan from the complainant to the defendant, which this mortgage was executed to secure.

The defendant alleges, that the money was not all advanced according to the terms of the agreement, and that in equity, it should stand for so much only as was advanced in strict compliance with the agreement.

It would, perhaps, have been most prudent for the complainant to have amended his bill, after the coming in of the answer. The defendant might have shaped his course so as to have compelled the complainant to do so. But as his defence, the defendant has spread out in his answer, all the matters at issue between the parties. He has brought all the matters in controversy between them, by proof, before the court. He cannot say he is surprised. The whole case is before me. There is no difficulty, upon the pleadings and proofs, in deciding without any embarrassment to either party, their respective rights. There is no good reason, therefore, why I should now dismiss this bill, and leave the matters open for further litigation.

Where the defence, set up by the answer, is of a character to require the complainant to make a new issue, in order to meet it, he will not be permitted to do so without amending his bill, and adapting it to the case upon which he expects to sustain himself. In the case of *James v. McKermon et al.*. 6 *Johns. Rep.* 543, the defendants set up, among other matters, an agreement, upon which they relied. The complainant was not permitted to show that the agreement was fraudulent, because the question of fraud was not put in issue by the pleadings.

In this case, the consideration of the mortgage was, substantially, and I think, technically too, for a loan of money. That the money was not paid down *instanter* on the delivery of the mortgage, but was advanced in several sums afterwards, upon the order of the mortgagee, or his agent, to a third person, does not alter its character, as a loan from the complainant to the defendant. The defendant insists, the money was not advanced pursuant to the agreement, and the complainant meets that issue. The only difficulty is, that in

meeting that issue, the complainant attempts to show, that if the money was not advanced in pursuance of the letter of the agreement, the advancement was sanctioned by the defendant.

But as I stated, the whole case is before me upon the proofs made by the defendant himself. I think, under such circumstances, it would be too technical to turn the plaintiff out of court. Indeed, I would not turn the complainant out of court, if I was of opinion that the defendant is entitled to the benefit of the objection. The court has the power, and has frequently exercised it, of allowing a bill to be so amended as to correspond with the case, even after proofs taken. It is a power which should be exercised discreetly. I think this is a case, where the due administration of justice would warrant it, if such a course was necessary.

What are the merits of the case? The defendant admits, that one hundred and twenty-four dollars were paid down when the mortgage was delivered; and as to this amount there is no difficulty. The further payment of $557 was to be made to Garrison, on the orders of Hughes, named as the agent for that purpose. After the building was partially finished, Garrison called for another payment on account, and it was made to him by the complainant. Hughes, sworn on the part of the complainant, says: "I also verbally authorised Mr. Van Riper, I think, to make the second payment, but am not certain, and cannot say whether I did or not." He says further, he gave him no order to make it, but he afterwards told him, if it was right he was perfectly satisfied. When Garrison said he had completed the building, the complainant advanced him the balance of the money, making in all $681, being the full amount, which by the agreement, he was to advance to Garrison. This last payment, Hughes swears, was made without his order, and in violation of his express orders to Mr. Van Riper.

The question is, whether, in equity, the mortgage should be declared as a valid subsisting security for the whole of the money advanced, or for such part only, as was in conformity with the agreement.

The defendant's house has been built with this money, and he is now in the enjoyment of it. There is no proof that the payments were not paid in good faith by the complainant. The allegation in the answer, that the complainant was indebted to Garrison, and gave a credit on this indebtedness, instead of paying in money, is not proved. It is inequitable that he should enjoy the benefit of this money, on the technical ground merely that Hughes did not order it paid, and not be held liable for it as a debt. In resisting payment, the defendant places his equity, first, on the ground, that Garrison did not build the house according to the contract. There was some difficulty between Claxton and Garrison, as to the work, but from the evidence, it would appear the matter in difference was not of much magnitude. Hughes, says, "I wanted the work altered so as to confirm to the contract—some portion of it was altered as I required, but I believe not all."

But it appears, that Claxton prosecuted Garrison, on this contract, for not building and finishing the house according to its terms, and that he recovered in that suit $10 damages. On the trial, Claxton offered in evidence, a receipt of Garrison to the complainant for $681, being the amount of the payments which the complainant had paid to Garrison, and which he now claims on his mortgage. He has thus had the full benefit of the money paid, and has sanctioned the payments in the fullest manner, and the mortgage, having been intended, and executed, to secure the money which the complainant should advance to Garrison, it should be held, in equity, a lien upon this property which ought to be satisfied.

But the defendant, further insists, that the liens filed in the clerk's office are incumbrances upon the property, and have become such in consequence of the conduct of the complainant.

It is unnecessary for me to determine, whether these liens filed are valid incumbrances or not.

I cannot see how the complainant is to be held responsible for any such consequences. If the complainant had not

advanced the money to Garrison, there might be some propriety in charging him with the default of Garrison, it being his duty to provide Garrison the means. If his failure to do so, had embarrassed Garrison, so as to prevent his paying for the materials for the building, there might be some just cause of complaint. But he was in no way bound for the honesty and fidelity of Garrison, and I do not think he is to be held responsible for his misconduct.

A reference must be taken to a master to take an account of the payments made by the complainant to Garrison, on account of the defendant, and to allow interest on such payments, from the time they were respectively made. The complainant is entitled to nothing more on his mortgage, except the sum paid Hughes, and interest upon it, which is to be included in the account.



Between JOSEPH IZARD, complainant, and JOEL BODINE, defendant.

Where a matter of fact has been referred to a master, depending upon the testimony of witnesses conflicting in their opinion, and differing in their recollection of past events, the decision of the master ought not to be interfered with on his mere judgment of the facts, unless it is a very plain case of error or mistake.

A master was directed to take an account of the waste, spoil and destruction, if any, committed or suffered on the premises, while the defendant, or any person claiming under him remained in possession. *Held*, that he would not have been authorized to go behind the decree to consider equities existing between the parties, which would entitle the plaintiff to any but the ordinary rule in taking the account; those equities are for the consideration and determination of the Chancellor. No special directions having been given in the decree, it was the plain duty of the master to follow the ordinary rules in taking the account.

This case was argued at October term, 1852, on exceptions to master's report.

W. Halsted, for complainant, in favor of exceptions.

A. Browning, contra.

THE CHANCELLOR. On the 29th of June, 1850, the Chancellor made an interlocutory decree, after hearing the case on the pleadings and proofs.

He declared, that the complainant was entitled to relief; and ordered a reference to the master, to take an account of the yearly rent and value of the premises, from the twentieth of June, eighteen hundred and forty-eight, until the time of making his report; and also, to take an account of the waste, spoil, or destruction, if any, committed, or suffered on said premises, while the defendant, or any person claiming under him, remained on the premises.

On the coming in of the master's report, the defendant filed the exceptions, which were, in substance, as follows:—

First: That the master had estimated the yearly rent and value of the premises at too low a sum.

Second. That he had not allowed interest on the yearly rent and value.

Third. That the master had not made a sufficient allowance for waste, &c.

As to the first exception. It was a matter of fact submitted to the master, depending in a great measure upon the opinion of witnesses. In taking the testimony, or in applying it to the case submitted to him, I cannot see that the master has violated any principle of law. If he has erred, that error is to be found in his judgment upon the facts. He has had the witnesses before him, personally, and has thus had an opportunity of judging of the weight their evidence is entitled to.

Where a matter of fact has been referred to a master, depending upon the testimony of witnesses conflicting in their opinion, and differing in their recollection of past events, the decision of the master ought not to be interfered with on his mere judgment of the facts, unless it is a very plain case of error or mistake.

I cannot say that I am dissatisfied with the report of the master as to the yearly rent and value of the premises.

As to the second exception, the master was not directed to allow any interest; and whether or not the complainant is entitled to interest, is a matter for the further consideration of the court.

The remarks I have made as to the first exception, are applicable to the third. But the counsel of the complainant insists, that the master should have allowed for something more than ordinary waste, and that the complainant was entitled to something more, from the nature of his case, as made by the pleadings and proofs.

The master was not authorized to go behind the decree. He was directed to take an account of the waste, spoil, and destruction, if any, committed, or suffered on the premises, while the defendant, or any person claiming under him re-



mained in possession. If there were equities existing between the parties, which entitled the complainant to any other than the ordinary rule, in taking this account, those equities were for the consideration and determination of the Chancellor, and not of the master. No special directions having been given in the decree, it was the plain duty of the master to follow the ordinary rules in taking the account.

I cannot, therefore, sustain this exception, as the interlocutory degree now stands. The account has been taken in the ordinary mode, and the master could adopt no other.

The exceptions are overruled, with costs.



ELIZABETH S. FISHER *et al. v.* JACOB F. QUICK *et al.*, Executors of JOHN P. QUICK.

A complainant cannot be permitted to have his bill dismissed without costs, unless by the consent of the defendant in open court, or by agreement in writing.

R. S. Field and *W. L. Dayton* for complainants.

P. D. Vroom for defendants.

THE CHANCELLOR. It is now moved, on behalf of the complainants, for leave to dismiss their bill without costs.

The defendants object to the motion. A complainant cannot be permitted to have his bill dismissed without costs, unless by the consent of the defendant in open court, or by agreement in writing.

In the case of *Fidelle v. Evans*, 1 *Brown's Reports*, 267, there was an agreement in writing between the parties, that the bill should be dismissed without costs. The court thought they could not make an order to dismiss without costs but upon consent in open court, and gave a rule to dismiss *unless cause* should be shown to the contrary.

It has been the practice of this court to grant such order upon the written consent of the parties. But I have been unable to ascertain any case where this court has allowed such motion, unless upon consent in court, or on filing an agreement of the parties to that effect.

In an anonymous case in 1 *Ves. J.* 140, on a motion on the part of the plaintiff, to dismiss his bill without costs, the Lord Chancellor said: "I am afraid it is beyond the course of the court; you may set down a cause upon a bill and answer, and either have a decree, or have the bill dismissed with, or without costs, according to the justice of the case. Though they do not appear to oppose it, yet if they do not appear to

consent, you are in as bad a way, you may dismiss your bill with costs, if you please."

In that case the bill was an injunction bill to restrain the defendants from taking judgment at law; and for delivering up deeds to be cancelled. The complainant was entitled to his decree had he chosen to follow up his suit, but he had accomplished his object in a more summary way in the court of King's Bench.

In 1 *Ves. J.*, 402, on like motion, the Lord Chancellor "refused the motion immediately, saying he could not conceive a case, in which a plaintiff could dismiss his bill without costs; that to dismiss it with costs was a motion of course; but that he could not then dismiss it without consent."

I am not aware, that in our practice there has been any departure from these authorities.

This case is before the court under very peculiar circumstances. It is unnecessary for me to go into detail, as those circumstances are well understood by the counsel on both sides.

The complainants may take their account under their interlocutory decree, which they have already obtained, and which has been affirmed in the Court of Errors, and then set down their cause for final hearing.

It does not follow, that because I may refuse the complainants a final decree, and order their bill dismissed, that they will be ordered to pay the costs. That will be a matter for the discretion of the court, to be exercised under all the circumstances of the case.

It is proper, perhaps, under my present impressions, to advise the defendants to consent to the motion, upon the complainants stipulating, not to prosecute the subject matter of the bill in another shape.

CASES

ADJUDGED IN

THE COURT OF CHANCERY,

OF THE STATE OF NEW JERSEY,

MAY TERM, 1853.

Between RULIF V. SCHANCK and WIFE, complainants, and JOHN ARROWSMITH *et al.*, defendants.

A testator gives a specified sum to each of his four daughters, to be paid to them one year after his decease, by one of his sons, to whom, (after giving an inconsiderable portion of the real estate to another son), he devises all the residue and remainder of the real estate; and declares, "The real estate above devised to my son is to be bound for the payment of the several sums, until paid to my several sons and daughters."

The claims of the legatees to charge the land for the payment of the legacies are resisted, on the ground that they have given to their brother the devisee, receipts in full for the payment of their respective legacies.

It was held that the legal effect of the receipt was to discharge the land of the lien, and standing without impeachment, it was a bar to the complainants' recovery in the suit. But that it was not conclusive between the parties—it was open to explanation. It was competent for the complainants to show that the money was not paid, or that the receipt was not in fact what it purported to be, "in full" for the legacy. That the principle was well settled, that the taking of an additional or other security of inferior or equal degree, would not *ipso facto* discharge a lien which attached by reason of an original security. It is always a question of intention, sometimes to be ascertained by the legal construction and effect of written instruments—sometimes by the circumstances of the case. So where a receipt was given "in full for the legacy," and the money was not



paid, but the devisee gave his promissory note, although the legal presumption, from the receipt "speaking for itself," was that the legatee *intended* to relinquish her lien upon the land, and *intended* to receive the note in satisfaction, yet this presumption could be overcome by positive testimony or by circumstances. And as it was not satisfactorily shown, that the legatee understood her rights, and was aware that the receipt would affect her legal rights under the will, the court would not give the effect to the receipt of destroying the lien upon the land.

And this lien will have priority over a mortgage or judgment executed or obtained after the notes were given, even where the mortgage was received, and the debt for which judgment was obtained was contracted, under the supposition that the land was free of the liens. For neither the judgment creditor nor the mortgagee lose anything by any confidence they placed in the fact that the receipts were given. But they were mistaken as to the law.

One of the legatees had obtained judgment upon the note given as above stated, and had also presented her claim to the auditors, under an attachment which had been issued. *Held*, that this could not affect her lien under the will. She had two remedies within her reach—she could prosecute on the personal liability, or enforce the lien against the land. She might pursue both remedies simultaneously.

Another of the legatees, who had obtained judgment some nine months before the attachment issued, caused execution to be issued on her judgment, by virtue of which a levy was made on the land in controversy, and also on personal property sufficient to satisfy the judgment and execution. After the levy, and prior to the issuing of the attachment, a number of attachments were issued by justices of the peace, and by virtue thereof the same personal property was levied upon. An arrangement was made between the legatee and the attaching creditors, by which she transferred to them her judgment. The attaching creditors gave her their joint note for the amount due, and took an assignment of the judgment and execution. They then sold the personal property by virtue of their attachments, cancelled their note to the legatee, and retransferred to her the judgment and execution. *Held*, that she had no right, directly or indirectly, voluntarily to relinquish her lien upon the property for the benefit of any other creditor, and that a subsequent *bona fide* judgment creditor must have the preference. That her judgment represents her legacy, and whatever equities attach to the judgment, as between it and subsequent *bona fide* incumbrances, her lien under the will must be subjected to.

Where real estate is devised to the same person who is directed to pay a legacy, the legacy will be an equitable charge upon the real estate so devised, unless a contrary intention is expressed in the will, or can be fairly implied from its provisions.

The bill alleges that John Arrowsmith, late of the county of Monmouth, died, possessed and seized of considerable real and some personal estate—that at the time of his death he left the following will, to wit: "I do order that all my just debts and funeral charges be paid and satisfied as soon as can conveniently be done after my decease, by my son

John Arrowsmith. Item—I give and bequeath unto my wife Mary Arrowsmith, the use and occupation of my mansion house and kitchen during her widowhood, and also to be comfortably supported by my son John Arrowsmith. And he also to pay unto my said wife Mary, the legal interest of two hundred dollars yearly, and every year during her widowhood. I also give unto my said wife my black girl, named Isabel, during her term of servitude; but if my wife should die before her term of servitude expires, then it is my will that the same Isabel should serve the remainder of her term with my daughter Maria Arrowsmith. I also give and bequeath to my wife one bed, and bedding for the same, her choice, and household and kitchen furniture sufficient to furnish her room in said house; and also two cows of her choice —the said cows to be kept on the farm, to her heirs and assigns forever; which said bequest and grant I give to my said wife in lieu and in full of dower, or right of dower and interest in my said estate. Item—I give and bequeath unto my four daughters, viz: Maria Arrowsmith, Lydia Arrowsmith, Miranda Arrowsmith, and Gitty Arrowsmith each three hundred dollars, to be paid to them, their heirs or assigns, one year after my decease, by my son John. I also give unto my four daughters above named, each one bed and bedding—Maria to have the choice after her mother; and each six silver tea spoons, to them, their heirs, executors, or administrators, or assigns forever. Item—I give and devise to my son, Simon Arrowsmith, my lot of salt meadow on Cheesequake creek, containing about four acres, be the same more or less; also, ten acres of woodland next and adjoining the lands of Hannah Pitney, the said ten acres to be so laid off as to make the line next to my homestead farm parallel with said Hannah Pitney's line; also, I give and bequeath unto my son, Simon Arrowsmith, the sum of one thousand dollars, to be paid by my son John, five years after my disease. Item—I give and bequeath unto my two sons, Thomas Arrowsmith and William Arrowsmith, the sum of one hundred dollars each, to be paid by my son John, one year after my decease. I give, grant, devise and

bequeath unto my son, John Arrowsmith, his heirs, executors, administrators or assigns, all the residue and remainder of my estate, both real and personal, of whatsoever kind and description, not hereinbefore disposed of in this my last testament and last will; also, all my notes, bonds and books of account I give unto my son John. The real estate above devised to my son John, is to be bound for the payment of the several sums until paid to my several sons and daughters. And, lastly, I hereby nominate, constitute and appoint my two sons, Simon Arrowsmith and John Arrowsmith, the executors of this my last will and testament, and hereby revoking and disannulling all former testaments and wills by me made."

The bill further charges, that John paid off the legacies to his brothers; that he gave his promissory notes to Lydia and Miranda (now the wife of John Crawford, one of the defendants,) for their legacies; that Lydia recovered a judgment against John in the Circuit Court of the county of Monmouth, upon the note given to her, and that Crawford and wife likewise recovered a judgment on their note; that John gave to the complainant, Gitty, a note for her legacy; that the said note was not payable to her order, or assigns, and was not in the form of negotiable paper, and was represented to her by John as in no respects affecting the complainant's (Gitty's) rights under the will, but was intended solely as a means of enabling him with more facility to settle up the estate; that the note is now in the possession of the complainants, subject to any order of the court; that the legacy is a lien upon the real estate devised to John, and that he took possession subject to said charge; insists that the said legacy is now a lien on the real estate, notwithstanding the note; that John is insolvent and has left the state; that since the date of the said note the said John has executed a morgage on the said land to Hendrick Longstreet to secure the sum of $2000; that Austin Reed and Daniel Craig, under the name of Reed & Craig, obtained a judgment against John for five hundred dollars and upwards; that Thomas J. Beedle has issued out a writ of attach-



ment against John as an absconding debtor, and by virtue thereof has attached the said lands and premises; that no part of the principal, and but a small part of the interest of her legacy has been paid to the complainant, Gitty.

The prayer is, that the legacy to Gitty, with the interest thereon, may be decreed to be a charge upon said real estate devised to John by the will of his father, and that in default of payment, so much of the said real estate be sold, as may be necessary to satisfy the said incumbrance, and all such other incumbrances, if any, as shall seem reasonable and just, &c.

To this bill, Mary, Lydia and Miranda, with her husband, John G. Crawford, filed their joint and several answers, and after admitting the allegations of the bill, Mary, (the widow) answering for herself, says: that John has only paid her the legal interest on the two hundred dollars, up to the 11th December, 1836: that for the last two years John has been extremely intemperate: that in 1846 the mansion house and kitchen named in the will, burnt down, and that although John built a new house, he refused to furnish her with a comfortable support according to the terms of the will; that in 1836 John's habits became grossly intemperate, and his conduct to her so cruel that it was dangerous for her to live with him: that for a long time previous thereto he had neglected and refused to support her comfortably on the premises or any where else, and that she was obliged to take refuge with her daughter Lydia, and that John has ever since the 29th of October, 1846, refused to furnish her any support; that he refused to furnish her with the two cows named in the will. She insists and claims that her right to the use and occupation of the mansion house and kitchen, to a comfortable support, and to the legal interest on two hundred dollars a year during her widowhood, and to the keeping of the two cows are liens upon the real estate devised to John, and that an account should be taken of the value of the use and occupation of the value of a mansion and kitchen as good as that existing at the death of her husband, during her widowhood, and of the value of her comfortable support

during her widowhood, and what may be due her for arrears of said support, and the use and value of keeping two cows, and of the arrears of rent due her yearly on the two hundred dollars, and that the gross, or weekly, or yearly value thereof, and of all arrears, may be ascertained and declared to be a first lien on the said real estate, and be first paid out of the proceeds of the sale thereof.

Lydia admits the payment of fifty dollars on her legacy, and states: that John gave her his note, not negotiable, for the balance, being two hundred and fifty dollars, dated July 23, 1838, and that in August, 1848, she recovered a judgment on the note, together with other claims, for an amount of four hundred and sixty-three dollars and seventy-seven cents; that when John gave her the note, he represented to her it would in no wise affect her claim under the will, but was intended solely as a means to enable him, with more facility, to settle the estate, and that the said note now remains in her hands unpaid.

Crawford and wife admit that on the 4th of May, 1847, John gave his promissory note to Miranda for two hundred and thirty-five dollars and seventy-two cents, the amount of principal and interest then due her on her said legacy; that it was payable to her and not to her order, and was not negotiable, and that at the time he gave it John made the like representations to her as he had made to his other sisters; that they have recovered judgment on the said note, and that the said note remains in their hands unsatisfied. The defendants state that there is no personal property to pay the legacies; that John is insolvent, and they insist that the legacies and widow's claims are liens on the said real estate.

Thomas J. Beedle, by his answer, sets up his judgment in attachment. He insists that the notes and receipts given at the time (which are more fully set out in John Arrowsmith's answer), and the judgments obtained, are extinguishments of any lien upon the lands.

And he further says, that as to Lydia's claim, that after she had obtained judgment and issued executio thereon, and



levied on the real and personal estate of J. A., several attachments were taken out before a justice of the peace, against the property of J. A., and judgments obtained thereon; that the levy on her judgment and execution being prior to the attachments, the attaching creditors applied to Lydia to purchase her judgment, and did purchase it; that this was done to enable them to make the money on their attachments out of the peronal estate, and thereby throw the whole amount of Lydia's said execution on the realty; that after they had so purchased the said judgment, they proceeded to sell under their attachments the personal property of J. A., holding at the same time the older execution issued on Lydia's judgment; that after this was accomplished they assigned the judgment back again to Lydia, and took up a note which they had given for the same.

As to Miranda's claim, the defendant further states, that she and her husband have filed their claim before the auditors in attachment, and have thereby waived their lien upon the land.

John Arrowsmith admits the giving of the promissory notes to his three sisters, but alleges that before he settled the estate in the Orphans' Court, to wit, on the 16th day of December, 1835, he settled with his sisters: that at the settlement he took from Gertrude the following receipt, viz: "Received of John Arrowsmith, one of the executors of Henry M. Arrowsmith, deceased, three hundred dollars, and one bed and bedding, appraised at forty dollars, and six silver spoons, in full of legacies bequeathed to me in the last will and testament of said deceased. December 16, 1835. Gertrude Arrowsmith." And that he took from Miranda and Lydia like receipts; that at the time the receipts were given, he did not pay in money, but gave to them severally his promissory notes for the same, or such part or parts thereof as he did not then pay and satisfy; that the said notes were taken with the assent of the legatees; that at the time they were taken he stated to them he wished them to take the notes and to give them their receipts in full for said legacies; that he wished to have his farm clear of the

lien or charge of said legacies, as he might want to sell it. And it was expressly understood and agreed and intended by the said parties at the time, that by taking the said notes and giving the said receipts, the farm and said estate should be cleared and exempted from the charge of the said legacies. He admits the recovering of the judgments by Lydia and Miranda, and insists that the legacies are not liens upon the land, but that they must look to their judgments and to him personally for payment.

W. L. Dayton for complainants, cited 1 *Smith's Leading cases*, 260; 21 *Wend.* 450; 19 *Ib.* 516: 1 *Hill*, 517: 2 *Wash. Cir. Ct. R.* 191, 193; 5 *John.* 68, 73; 8 *Ib.* 389; 9 *Ib.* 310; 15 *Ib.* 247; *December No. A. L. R.* 87; *Chitty on Con.* 294, 299; 1 *Hal. Ch. R.* 493.

P. D. Vroom for John Arrowsmith and Thomas J. Beedle.

P. T. Vredenburgh for the administrator of the widow and Lydia and Miranda, cited 1 *Dallas*, 420: 20 *Wend.* 17: 13 *John. R.* 244; 14 *Ib.* 404; 4 *Cowen's Rep.* 567; 3 *East.* 258; 2 *Binney*, 152; 11 *John.* 513; 1 *Cowen*, 578: 5 *Wend.* 129; 4 *Ib.* 339; *Foret Eq.* 182.

THE CHANCELLOR. The object of the bill is, to raise by sale, out of the real estate of which Henry M. Arrowsmith died siezed, the amount of a legacy, which, by his will, he left to his daughter Gertrude, one of the complainants.

John Arrowsmith is made a defendant in the suit, because he is the devisee of the real estate upon which, it is alleged, the legacy is chargeable.

Mary Arrowsmith, who, since filing the bill, is deceased, and is now represented by her administrator, was made a defendant, because, as the widow of the testator, she claimed a lien or charge upon the estate, by reason of a bequest made to her by the testator.

Mary, Maria and Lydia Arrowsmith, and Miranda Crawford, are made defendants, because they claim, as legatees of

the testator, like liens as the complainants, for legacies to them respectively.

Hendrick Longstreet holds a mortgage on the land, executed to him by John Arrowsmith, the devisee; and Thomas J. Beedle is a judgment creditor of John Arrowsmith.

By the pleadings, the rights of all these persons are to be determined and adjusted.

As to all the parties claiming under the will, with the exception of Mary Arrowsmith, the widow, their rights are not controverted.

To his daughters Maria, Lydia, Miranda and Gertrude, the testator gives the sum of three hundred dollars each, to be paid to them, their heirs and assigns, one year after his decease, by his son John; and after giving an inconsiderable portion of his real estate to his son Simon, he devises all the residue and remainder of his real estate to his son John in fee, and declares, "The real estate above devised to my son John, is to be bound for the payment of the several sums, until paid to my several sons and daughters."

The claims of the legatees in this suit to charge the land for the payment of their legacies, are resisted, on the ground that they have given to John Arrowsmith, the devisee, receipts in full for the payment of their respective legacies.

The rights of the parties will be examined separately, as they vary in some particulars, which are deemed of importance.

First, as to the claim of Gertrude, one of the complainants.

On the 16th of December, 1835, Gertrude gave to John the following receipt:—"Received, of John Arrowsmith, one of the executors of Henry M. Arrowsmith, deceased, three hundred dollars, and one bed and bedding appraised at forty dollars, and six silver spoons, in full of legacies bequeathed to me in the last will and testament of said deceased."

The fact of a bed and bedding, and six silver spoons being included in the receipt, has no bearing upon the question



raised. They are articles specifically bequeathed to the legatee by the will.

The legal effect of this receipt, is to discharge the land of the lien, and standing without impeachment, is a bar to the complainants' recovery in this suit. But it is not conclusive between the parties. It is open to explanation; and it is competent for the complainants to show, that the money was not paid, or that the receipt was not, in fact, what it purports to be, "in full" for the legacy.

It is admitted, that at the time the receipt was given, the money specified therein was not paid, but that John gave to his sister his promissory note for the amount. That note remained outstanding until the fourth of May, 1847, when it was renewed by a note of four hundred dollars. Some interest was, from time to time, paid on the notes.

It was not controverted on the argument, that the principle is considered as well settled, that the taking of an additional, or other security, of inferior, or equal degree, will not *ipso facto* discharge a lien which attached by reason of an original security. If the original security is actually cancelled, or the lien created by it, formally released, of course no resort can be had to it. It is always a question of intention—sometimes to be ascertained by the legal construction and effect of written instruments—sometimes by the circumstances of the case.

But the defendants rely upon the receipt. They say it is a receipt "in full" for the legacy. It is the evidence, that Gertrude received the note in satisfaction, and that she thereby intended to relinquish her lien upon the land. *Prima facie* this is so. The receipt speaking for itself, will have that effect; such is the legal presumption, and it must be so construed, unless there is something—either positive testimony, or circumstances of a character to overcome the presumption.

John Arrowsmith, in his answer, says, that at the time he gave the note, he stated to his sister, that he wished her to take his note, and to give her receipt in full of the legacy—that he wished to have his farm clear of the lien or charge



of the legacy, as he might want to sell it; and that it was expressly understood and agreed, and intended by both parties at the time, that by taking the note, and giving the receipt, the real estate should be cleared and exempted from the charge of the legacy.

These allegations are not proved, and the defendant is not entitled to the benefit of them, except as negations to charges in the bill. The bill alleges, that when the note was given, John represented to the complainant, Gertrude, that it in no respect affected her rights under the will. The portion of the answer alluded to is responsive to this charge, and a denial of it; but when the defendant goes further, and alleges a different agreement or understanding, he must, in order to derive any benefit from it, prove it as it is alleged in his answer.

Looking at the character of the transaction itself, and the circumstances under which the receipt was given, what did the parties intend by that receipt?

The testator had given the largest portion of his estate to his son John. He had cut off this daughter from the inheritance of the real estate, and in lieu of it, directed John to pay her three hundred dollars, and declared, in express terms, that the legacy should be a charge upon the land until it was paid. He dies, and leaves his widow, his son John, and his four daughters, living upon the homestead. Soon after his father's death, John gives each of his sisters a note for their respective legacies, and draws up receipts in his own hand writing, for each of them, which they sign, purporting to be "*in full*" for their legacies. No person was present to act on behalf of the girls, and explain to them their legal rights, or the effect of the receipts they were about to give. They were dealing with a brother in whom they confided, and upon whom they felt in a measure dependent. Why should they have taken John's mere personal security and released the land? Their father, by his will, had secured to them their legacies upon the land. He did not see proper to trust to the mere personal security of his son. The relation of the parties must be looked at—

the character of the debt—the consideration given—and the circumstances attending the whole transaction—in order to determine what effect ought to be given to the receipt. It appears to me, in looking at the whole case, a court of equity ought not to give the effect to that receipt, of destroying the lien upon the land, without its being satisfactorily shown that Gertrude understood her rights, and was aware that the receipt would effect her legal rights under the will. We can hardly suppose that she understood the difference between a receipt "in full" for the legacy, or a mere receipt for the notes given to her. If that receipt is to discharge the land, the legatee relinquished, without any consideration, the very security by which her father intended to make her legacy secure to her.

In the case of *Sutton et al. v. The Albatross*, reported in the December number of "The American Law Register," Mr. Justice Grier, in a case where a receipt "in full" was set up as extinguishing a lien, remarks, "The giving the receipts for the notes, as in full of the account, it is true, is *prima facie* evidence, that such was the case. But a receipt is no estoppel; and when we consider how little attention is usually paid to the peculiar form or expressions of such documents, signed by mechanics, and drawn up by the clerk of the employer, such formal words may be easily rebutted, by showing the true nature of the transaction. The note taken is no higher security than the account, and unless the transaction shows an intention to surrender without consideration, the better security, these formal words in a receipt given, when the account is settled, ought not to be considered as at all conclusive of an intention to receive the lesser security as satisfaction." See also case of *Jones v. Shawhan*, 4 *Watts and Serg.* 263. I do not think the receipt destroys the lien upon the land.

But it is further insisted that this lien should be postponed to the payment of Longstreet's mortgage and Beedle's judgment.

As to the mortgage, the mortgagee sets up no equity, and asks for no priority over this lien. If the mortgagee, was mis-

led by the receipt or by the conduct of the complainant, Gertrude, so as to entitle him in equity to have his lien preferred, he should have come in by answer and set up his equity. The bill charges the mortgage to be a subsequent incumbrance. So it is upon its face. If there are any circumstances to give it a preference, they must be placed upon the record, and be submitted to the decision of the court.

Beedle, the judgment creditor, has answered. His judgment was obtained on an attachment, in the year 1849. He alleges that when his debt was contracted, he understood and believed that the legacies had been settled and arranged by John—that he knew, by information from John, that receipts had been given for the legacies, and that it was known by others that a settlement had been made by John with the legatees, and that they had taken his notes for the amount and in satisfaction for the legacies. He does not pretend that he gave John credit, or that the debt in question was contracted upon the faith of John's owning the property free of these liens. He made no inquiry of the legatees. He knew the legacies were not paid, and that John had given nothing more to liquidate them than his promissory notes. He knew the circumstances, and he supposed the lien on the land was discharged. He was mistaken as to the law. He loses nothing by any confidence he placed in the fact that the receipts were given.

I think the amount due Gertrude on her legacy, is a lien upon the land, and has priority over the mortgage and judgment.

The claim of Miranda Crawford rests upon the same ground as that of Gertrude, with the exception that upon the note given her, she obtained judgment against John Arrowsmith, and also presented her claim to the auditors under the attachment.

The fact of her obtaining judgment cannot, I think, affect her lien under the will. She had two remedies within her reach. She could prosecute John on his personal liability, or enforce her lien against the land. She might pursue both her remedies simultaneously without affecting either, or one of them, at her pleasure; and until the debt was discharged

by actual payment, no objection could be made to either prosecution. The judgment did not discharge the debt, nor was it a merger of the claim upon the land. Nor can I see that the presenting her claim to the auditors could abridge her rights. The judgment was obtained May 1, 1849, and was subsequent to the attachment. She knew her claim under the will was a matter to be contested. From abundant caution, she presented her claim to the auditors, and not with the intention of abandoning any lien or priority she might otherwise have.

As to the claim of Lydia. Upon the note given her, she obtained judgment some nine months before Beedle's attachment was issued. By John Arrowsmith it is insisted that the course pursued by Lydia, under her judgment, was an abandonment or waiver of her lien under the will; and by Beedle it is insisted further, that if not a waiver, it ought to postpone her claim upon the land to his judgment, as well as to Longstreet's mortgage.

Lydia caused execution to be issued on her judgment, by virtue of which a levy was made on the land in controversy, and also on personal property, sufficient to satisfy the judgment and execution. After the levy, and prior to the issuing of Beedle's attachment, a number of attachments were issued by justices of the peace, and by virtue thereof the same personal property was levied upon. An arrangement was made between Lydia and these attaching creditors, by which she transferred to them her judgment.

It was a mere formal arrangement, entered into for the purpose of so controlling that judgment and execution, as to appropriate the personal property to the payment of the attachments, and throwing the whole burthen of the judgment upon the real estate. The attaching creditors gave Lydia their joint note for the amount due, and took an assignment of her judgment and execution. They then sold the personal property by virtue of their attachments, and realized out of the sale the sum of three hundred and eighty-six dollars and fifty-seven cents. Their note to Lydia was then cancelled, and the judgment and execution retransferred to her.



If John Arrowsmith had set up his answer, and insisted that the judgment of Lydia should be declared satisfied as against him, I should, under all the circumstances attending the transactions, have been much inclined to that conclusion. From the testimony of Sheriff Conover, it appears that he levied upon personal property worth from eight hundred to one thousand dollars. It was taken under the law, by the sheriff, to pay that execution, and the defendant was deprived of all control over it. There is no pretence that it was left with the defendant at his request, or for his accommodation. The sheriff having taken the defendant's property to pay the debt, the defendant had a right to have it so appropriated. The moment the sheriff took the property, the defendant was entitled to have it credited on his execution. The defendant could not compel him to sell it. If the sheriff did not sell it, he was accountable to the plaintiff. If the plaintiff has, in any way, relieved the sheriff from that accountability, he had a right to do so; but in doing so, he cannot affect the rights of the defendant. The plaintiff, by process of law, took the property out of the defendant's possession to pay the debt due on the execution. She had no right, directly or indirectly, voluntarily to relinquish her lien upon it for the benefit of any other creditor, without the consent of the defendant. Look at the consequences to the defendant in this case. Lydia obtains judgment against him, and levies upon personal property to the amount of upwards of eight hundred dollars, more than twice sufficient to pay the judgment. The defendant leaves the state, and some five or six attachments are taken out against him. The judgment and attaching creditors then arrange between themselves to give the latter the preference, and finally this property, which, when taken by the sheriff, was worth from eight hundred dollars to one thousand dollars, is sold by constables for three hundred and eighty-six dollars and fifty-seven cents. Who ought to bear this loss? Most assuredly the judgment creditor, unless he can show some good reason why, in equity, the burthen should be placed upon the debtor.

As to Beedle, who is a subsequent *bona fide* judgment creditor, I have no doubt as to the equities between his judgment and that of Lydia Arrowsmith's. According to the principle recognized in the case of *Johnson v. Tuttle and others*, decided at this term, Beedle's judgment must have the preference. Lydia's judgment represents her legacy. Whatever equities attach to the judgment, as between it and subsequent *bona fide* incumbrances, her lien under the will must be subjected to.

Let a decree be drawn in conformity to these views.

The only subject remaining for consideration, is as to the rights of Mary Arrowsmith, the widow, under the will.

The testator orders his son John to pay all his debts, and then declares, "I give and bequeath unto my wife, Mary Arrowsmith, the use and occupation of my mansion house and kitchen during her widowhood, and also to be comfortably supported by my son, John Arrowsmith, and he also to pay unto my wife Mary, the legal interest of two hundred dollars yearly, and every year during her widowhood. I also give and bequeath to my wife one bed and bedding for the same, her choice, and household and kitchen furniture sufficient to furnish her room in said house; and also two cows to be kept on the farm, to her heirs and assigns forever; which said bequest and grant I give to my said wife in lieu and in full of dower, or right of dower, in and to my estate." The testator then gives pecuniary legacies to each of his four daughters, and to three of his sons—a small lot of land to another, and then all the residue and remainder of his estate, real and personal, he devises to his son John, and then makes the legacies to his sons and daughters in express terms charges on the real estate devised to John. By his answer, John neither admits or denies the bequests to his mother to be charges on the land, but answers, he was always ready and willing to perform what was enjoined on him under the will, and to give her a comfortable support, and did actually furnish and supply her with more than the requirements of the will.

It has frequently been decided that where the real estate is devised to the same person who is directed to pay the legacy, it will be an equitable charge upon the real estate so devised, unless a contrary intention is expressed in the will, or can be fairly implied from its provisions. *Harris v. Fly and others*, 7 *Paige* 421, and cases there cited; also 1 *U. S. Eq. Dig. page* 382, § 735. The case of *Mathewson v. Saunders*, 11 *Conn.*, 104, is much in point.

In this case the will provides a home for the widow on the land, and orders John, the devisee of that land, there to maintain and support her. It directs her to release her dower in the land to John, and leaves her without means of support, except such provision as John is ordered by the will to provide her. It was the intention of the testator, fairly inferable from the whole will, that his real estate should be chargeable with the support of his widow, and should be bound for the payment of the legacies he had given her.

It is proper, from the evidence before me, to give some directions as to taking the accounts of the widow's claims.

By the will she was to occupy the house and kitchen on the land. These buildings were destroyed by fire some years after the testator's death. It is insisted that John was bound to replace them, or give her an equivalent. This is not so. The loss must be sustained by the widow. The land is only to be charged for such reasonable sum as would have supported her, if occupying the dwellings designated and provided for her. And in taking the account for her support and maintainance, it must be taken only from the time of instituting these proceedings. It is not denied that John provided for her while she lived on the farm, and there is evidence that afterwards, while she resided with her daughter Lydia, he furnished provisions for the family, and did a large amount of work for Lydia, which may be properly considered in the light of compensation for the mother's board. He offered her a home at his own house, which she refused, and without deciding whether the evidence is sufficient to justify her in such refusal, there is no proof that

any demand was made upon John for her support at any time, or any complaint that he did not provide for her.

A charge must be made of the interest on two hundred dollars from the eleventh of December, 1836, to the time of the widow's death.

She was entitled to have two cows kept on the land during her life. It does not appear that this right was ever denied her. But as to the value of the cows and their keeping, the benefit of them will be denied in taking an account of the support. The amount required for such support would have been so much the less had she enjoyed the profit of the cows.

In taking the accounts, the defendants will be at liberty to prove any advances made in money or otherwise, by John for the widow's benefit, and to proper allowance for the same.

Let an account be taken of the amounts due Gertrude, Lydia and Amanda, each, on their legacies.

The claims of Gertrude, Amanda and the widow of the testator, are entitled to priority, and then the Longstreet mortgage.

One-third of the residue must be invested for the dower right of John Arrowsmith's (son) widow. Out of the remaining two-thirds, the costs of the attachment must first be paid; then the creditors who have come in under the attachment *pro rata*, and then Lydia's judgment. After the death of the widow of John, the principal money invested for the widow's dower, must be distributed according to the priorities here established.

ROBERT C. STOUTENBURGH v. CALVIN TOMPKINS.

A court will not decree specific performance where it would be inequitable under all the circumstances of the case. Where a contract is hard and destitute of all equity, the court will leave parties to their remedy at law.

An agreement may be fully proved, it may be clear in every particular, and upon its face equal and just in all its parts; the defendants may be unable to prove any mistake, fraud or accident in reference to its execution, and yet the conduct of the complainant may have induced such a state of things in relation to the subject matter of the agreement as would make it not only proper, but the plain duty of the court to refuse its aid in enforcing its specific performance.

It follows, that however closely the court may be disposed to adhere to the salutary rule of law, that parol evidence is not admissible to vary, contradict or control a written instrument, it must necessarily exercise much more liberality in admitting evidence in order to reach the equity of the case, than would be allowed by a court of law.

Courts of equity have manifested much more liberality in admitting parol evidence in cases of specific performance to resist than to enforce it. Yet the principle has never been established by authority, that such evidence is admissible, even in defence, to *vary* or *contradict* a written agreement.

A defendant cannot resist a specific performance, on the ground that the agreement entered into differs from that which was reduced to writing, without showing that the difference was the result of fraud, mistake, accident or surprise.

But there is a great difference between introducing parol evidence for the purpose of showing that the writing does not express the *true intention* of the parties, and introducing it for the purpose of showing the circumstances which make it inequitable and unconscientious, that the intention should be carried out.

It is well settled, that specific performance is discretionary with courts of equity, and a defendant will generally succeed in procuring a dismissal of the bill, if he convinces the court that the exercise of the jurisdiction will be inequitable under the circumstances.

One who has been in the enjoyment of property under an agreement, and has surrendered and abandoned it; who has betrayed the confidence existing between the parties, and has by his conduct and dealings with the defendant, and his treatment of the property, beguiled the defendant into the belief that he intended to give up all his rights and interest in the contract, comes into court with a case wholly void of equity, when he demands a specific performance.

A want of mutuality is an objection to a decree for a specific performance.

The court will not enforce a contract where the parties are not mutually bound to fulfil it. (*Authorities reviewed.*)

So where the interest of a party in a contract passed into the hands of his assignee in bankruptcy, all reciprocity as to the remedy was destroyed; and if the assignee, or a person holding under him, seeks a specific performance, he must affirm the contract and make it mutual, at least within a reasonable time.

This was a bill for the specific performance of an agreement in writing, entered into the 4th day of February, 1841

—bill filed October 10, 1846. Hearing upon bill, answer, replicacation and proofs.

W. K. McDonald and *A. Whitehead* for complainant.

J. P. Bradley and *J. C. Hornblower* for defendant.

THE CHANCELLOR. This bill is filed to compel the specific performance of an agreement, which was entered into in writing between the defendant and one Henry Wilde, on the fourth day of February, A. D., 1841.

By the agreement, the defendant, for the consideration of one dollar then paid, and the further sum of three thousand three hundred and forty-six dollars to be paid, for himself, his heirs, executors, and administrators, agreed with the said Wilde, his heirs, executors, and administrators, that the said defendant, his heirs and assigns, should and would, on the payment of the last mentioned sum of money as thereinafter mentioned, convey and assure to the said Wilde, and to his heirs and assigns, all the four undivided one-hundredth parts of those certain tracts or parcels of land, situate, lying and being in Ulster and Rockland counties, New York, the said tracts of land being intended to embrace all the real estate owned jointly by the defendant, Jotham Hedden, Ira Van Geison, Reuben D. Baldwin, and Daniel Tompkins, comprising the firm of Tompkins, Hedden & Co., and that he, the defendant, would at the same time sell and transfer unto the said Wilde, his heirs and assigns, twenty-four shares of the capital stock of The Newark Lime and Cement Manufacturing Company. Henry Wilde, for himself, his heirs and assigns, covenants to pay for the said land and stock, on or before the 4th of February, 1846, the sum of eight hundred and forty-six dollars, with interest at six per cent. per annum, that might accrue from the date of the agreement to the time when the said payment should be made as aforesaid, and also would, at the time the said payment should be made, (at which time the conveyance of the premises and stock should be made), execute a bond, in the penal sum of five thousand dollars, conditioned for the payments of the sum

of two thousand five hundred dollars, together with such additional sum as should be equal to the interest accruing to that time, in one year from the date thereof, with interest semi-annually, which bond should be secured by a mortgage on the premises and stock. It was further agreed that the defendant, in addition to the said land and stock aforesaid, would, at the same time, also sell and convey, for the same sum before mentioned, four undivided hundredth parts of the personal property, fixtures, accounts, notes, and bills of exchange, profits, appurtenances, and other advantages which should in the mean time accrue, and result from, or on account of the business, at the time of the date of the agreement carried on, and to be continued on the real estate before mentioned, and to the same extent that the said Henry Wilde would be entitled to receive, if he were an actual partner in the business conducted, going on, and connected with the said real estate, to the extent of four one hundreth shares of the said business. It was further, by the said agreement, declared to be the general intent of the parties thereto, that the said Henry Wilde should purchase the real estate and capital stock aforesaid unincumbered, and have his proportionate share in the profits of the operation then going on, and to be continued on the said real estate, and that the said defendant should receive therefor, the sum of thirty-three hundred and forty-six dollars, with interest from the date of the said agreement.

On the 18th of June, 1842, about sixteen months after the date of the agreement, Wilde filed his petition in the District Court of the District for New Jersey, for the benefit of the bankrupt law; and in his schedule of property was included his interest in this agreement.

On the 12th of July, 1842, he was declared a bankrupt; and on the 16th of that month James Hewson was appointed his assignee; and the agreement, with Wilde's other property, passed into his assignee's hands.

On the 23d of March, 1843, the assignee sold the interest of Wilde in the agreement at public auction, and the com-

plainant being the highest bidder, it was struck off to him at the sum of three dollars and seventy-five cents.

On the 6th of October, 1845, the assignee executed and delivered to the complainant, a deed of assignment, of all his right, title, and interest in the said agreement.

On the 10th of October, 1846, the bill of complaint in this suit was filed.

The defendant relies upon the general ground, that it would be inequitable and unjust, under all the circumstances of the case, to compel him specifically to perform this agreement.

This is a good defence. The court will not become an instrument of injustice; and if the case presented is such, that it would be unconscientious to grant the complainant the relief he seeks, and repugnant to a just sense of right between man and man, the court will refuse its aid.

"The exercise of this branch of equity jurisprudence (2 *Story*, § 742) is not a matter of right in either party; but it is a matter of discretion in the court; not indeed of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion, which governs itself, as far as it may, by general rules and principles; but at the same time, which withholds or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between parties."

This principle is recognized by all the authorities, and very clearly by Mr. Justice Thompson, in the case of *King and others v. Hamilton and others*, 4 *Peters* 311. "A court will not decree specific performance, where it would be inequitable, under all the circumstances of the case. The power of a Court of Chancery to enforce a specific execution of a contract, is a very valuable and important one, but it is to be exercised under the sound discretion of the court, with an eye to the substantial justice of the case. Where a contract is hard, and destitute of all equity, the court will leave parties to their remedy at law."

An agreement may be fully proved—it may be clear in

every particular, and upon its face equal and just in all its parts—the defendant may be unable to prove any mistake, fraud, or accident, in reference to its execution; and yet the conduct of the complainant may have induced such a state of things in relation to the subject matter of the agreement, as would make it not only proper, but the plain duty of the court, to refuse its aid in enforcing its specific performance.

If such are the principles by which a court of equity is governed, in the exercise of this branch of its jurisdiction, it follows that however closely the court may be disposed to adhere to the salutary rule of law—that parol evidence is not admissible to vary, contradict, or control a written instrument—it must necessarily exercise much more liberality, in admitting evidence in order to reach the equity of the case, than would be allowed by a court of law. It is vain to say that a court of equity will refuse its aid to compel a party to do what a conscientious man ought not to ask him to do, under all the circumstances of the case; and yet, by a strict application of a principle of law, forbid his proving the circumstances which establish the hardship and inequity of the case.

The question as to the extent to which courts of equity have gone, in admitting parol evidence in cases of specific performance, was argued, at much length, and with great ability by the counsel in this case. It was insisted by the complainant's counsel, that while a distinction had been drawn as to the admissibility of such evidence, between cases where it was offered on behalf of the complainant, and when on that of the defendant, and much more liberality manifested in its admission to resist, than to enforce a specific performance; yet, that the principle had never been established by authority, that such evidence is admissible, even in defence, to *vary*, or *contradict*, a written agreement. I think the counsel were right. A defendant cannot resist a specific performance, on the ground that the agreement entered into differs from that which was reduced to writing, without showing that the difference was the result of fraud, mistake, accident, or surprise. The case of *Legal v. Miller*,

2 *Ves.* 299, and some others cited on the argument, do not, on careful examination, establish a contrary doctrine.

But there is a great difference between introducing parol evidence for the purpose of showing that the writing does not express the *true intention* of the parties, and in introducing it for the purpose of showing the circumstances which make it inequitable and unconscientious that the intention should be carried out. A written contract may be abandoned by parol, if not so as to destroy the rights of the parties at law, at least so far as to constitute a good defence to a bill for specific performance. So if it has been varied by a subsequent parol agreement which has been carried out, and so acted upon by the parties, that the written agreement cannot be enforced without injury to one party, it is a good ground of defence, and may be proved as such. *Legal v. Miller*, 2 *Ves. Sen.* 299; *Price v. Dyer*, 17 *Ves.* 357; 2 *Joh. Ch.* 216; *Gormon v. Salisbury*, 1 *Vern.* 240. *In vol.* 2, *part* 1, *Leading Cases in Eq.* 514, the principle, as deduced from a large number of authorities there cited, is said to be, that a defendant, in a bill brought to enforce a specific performance, is not exempted from the ordinary rules of evidence, nor entitled to vary a written contract by parol, without showing fraud or mistake, to justify the variation. But it is equally well settled, that specific performance is discretionary with courts of equity, and a defendant will generally succeed in procuring a dismissal of the bill, if he convinces the court that the exercise of the jurisdiction will be inequitable under the circumstances.

The defendant offers to show that the circumstances of this case place him in a position in which it would be unjust, and against equity, to compel him specifically to perform the agreement. He offers to show the character of the property which is the subject matter of the agreement, the business relationship of the parties in connection with the property, its enjoyment by Wilde under the agreement, and then its surrender and abandonment; that while his own conduct has been honest and liberal towards Wilde in reference to the contract, Wilde voluntarily, to the great detriment of the

defendant, destroyed its mutuality, betrayed the confidence existing between the parties, and that he has by his conduct and dealings with the defendant, and his treatment of the property, beguiled the defendant into the belief that he intended to give up all his rights and interest in the contract. The defendant insists that the complainant, purchasing the property for the sum of three dollars and seventy-five cents, in view of all the circumstances, and then delaying for more than three years before he even gave notice to the defendant of his claim, comes into court with a case wholly void of equity.

I shall exclude all the evidence going to show an agreement by parol, independent of the written agreement, which varies or contradicts it; but all the evidence bearing upon the particulars to which I have alluded, violates no rule as to the admission of testimony, and must be examined in order to reach the equity of the case.

Let us now examine the circumstances of the transaction, in order to ascertain the equities between the parties.

By the agreement, the defendant was to convey to Wilde, the four undivided one-hundredth parts of certain real estate owned jointly by the defendant, and Elias Tompkins, Jotham Hedden, Ira Van Geisen, Reuben D. Baldwin and Daniel Tompkins, comprising the firm of Tompkins, Hedden & Company, and twenty-four shares of the capital stock of The Newark Lime and Cement Manufacturing Company.

Prior to the year 1840, the firm of Tompkins, Hedden & Co., were carrying on the business of burning, manufacturing and selling lime, cement and plaster. Their principal establishment was located at Newark, where they owned valuable property; and in addition to their property at Newark, they were the owners of the real estate mentioned in the agreement. The property was divided into one hundred parts, of which the defendant owned thirty-five hundredths, and the other persons interested owned the residue in different proportions. In February, 1840, The Newark Lime and Cement Manufacturing Company, was incorporated. The property of the firm of Tompkins, Hedden & Co., located at Newark, was converted into the capital stock of the

corporation, at a valuation of sixty thousand dollars, so that each copartner received six shares, or six hundred dollars in the capital stock of the corporation for any one undivided one-hundredth part owned by him in the copartnership property. The remainder of the property and business of the firm of Tompkins, Hedden & Co., continued to be held and conducted in the same manner as was done before the act was passed. Every person interested as a partner and stockholder, was actively employed in the business of the concern, for which each received a fixed weekly allowance in cash.

The real estate in New York was held in hundredth parts, by the stockholders in the corporation, in proportion to the capital stock of the corporation respectively held by each of them. Of course any six shares in the corporation were entitled to one-hundredth part in the real estate.

Prior to the execution of the agreement in controversy, Wilde was in the employment of the corporation and copartnership, receiving a salary of six hundred dollars per annum.

He entered into an agreement with the copartners and the stockholders in the corporation, for the purchase of eight shares in the whole concern, which was forty-eight shares of the stock, and eight undivided hundredth parts of the real estate. Of this interest two and one-half shares were to be furnished by the defendant, three by Wheeler, one by Baldwin, one and one-half by Ambrose Tompkins. A memorandum of this agreement was made in writing by Wilde himself. It constituted a part of the minutes of a joint meeting of The Newark Lime and Cement Manufacturing Company, and the firm of Tompkins, Hedden & Co., of which meeting Wilde acted as the clerk, and is dated January 5th, 1841. The agreement in controversy was entered into between the parties, to carry out that portion of the arrangement of January 5th, 1841, which devolved upon the defendant. The defendant was to furnish two and one-half shares, but as his brother, Ambrose Tompkins, was to furnish one and one-half shares, and his shares were in the name of the defend-

ant, who held them in trust, he bound himself to convey four hundredth parts of the real estate, and twenty-four shares of the capital stock, being equivalent to the two and one-half shares which he was to furnish, and the one and one-half shares his brother Ambrose was to furnish, under the arrangement of January 5, 1841.

Under the arrangement of January, 1841, Wilde entered into the immediate enjoyment of his purchase. He was to receive, by a further understanding between the parties in interest and himself, the actual profits on seven shares, from January, 1840, he paying interest on the shares valued, at the rate of $80,000 for the whole property.

That this was the understanding, is proved by a letter written and sent by Wilde to Tompkins, Hedden & Co., showing who were to furnish the shares, and when the interest of Wilde in them was to commence. It is shown, also, by the endorsement on the agreement between Wilde and the defendant. On the agreement there is endorsed, in Wilde's handwriting, dated February 4, 1841, a receipt for one hundred and twelve dollars principal. This receipt is open to explanation, and it is competent for the defendant to show how this money was paid. It appears that on the first of February, 1841, the company declared a dividend of twelve per cent. on their capital stock, which, on the twenty-four shares, amounted to two hundred and eighty-eight dollars. After deducting from this sum the interest of the purchase money for the year 1840, it left the sum of one hundred and twelve dollars due Wilde, and this was endorsed as so much paid on the principal. There are two other endorsements on the agreement, both dated January 1st, 1842, one of one hundred and seventy-five dollars and fifty cents interest, and the other of one hundred and eighty-four dollars and forty-four cents for principal. On the 13th January, 1842, the company declared another dividend of fifteen per cent., which, on the twenty-four shares, amounted to three hundred and sixty dollars; of this sum, the one hundred and seventy-five dollars endorsed, was the one year's interest on the principal then due of three thousand



two hundred and thirty-four dollars, from the date of the agreement—the balance being one hundred and eighty-four dollars and forty-four cents, was a credit on the principal. And, further, Wilde gave up his salary of six hundred dollars a year, and received for the year 1840, and up to August, 1842, the same weekly wages which were received by the other members of the firm; and at the joint meeting of The Newark Lime and Cement Manufacturing Company, and the firm of Tompkins, Hedden & Co., he enters himself in the minutes, as one of the parties in interest, present.

Thus it satisfactorily appears that Wilde entered into an arrangement with the firm of Tompkins, Hedden & Co., to become a member of that firm, and that on the 5th of January, 1846, he made a memorandum in writing, in the presence of the members of the copartnership, of the interest which he was to have in it, and which of the individual members of the firm were to furnish the interest, and in what proportions; that he immediately became an active member of the firm upon the same terms with the other individuals composing it, and actually received, for a part, at least, of his interest, the proceeds and profits. The agreement, which he entered into in writing on the following month, with the defendant, was a part of the agreement entered into by him with the firm, January 5, 1841. It was executed for the very purpose, and did, by its terms, secure to Wilde, in part, the benefit of the agreement he had made with the firm. The defendant has a right to have it construed in connection with that agreement. He has bound himself to convey to Wilde a certain interest in a copartnership, and agrees that Wilde shall have an account for four undivided hundredth parts of the personal property, fixtures, accounts, notes, bills of exchange, profits, appurtenances, and other advantages, which shall accrue, or result from, or on account of the business carried on by the said firm, from a certain period of time. The moment he fulfils that agreement, the firm are driven to the necessity of taking Wilde into partnership, or they must dispose and settle up their concerns in order to ascertain Wilde's interest. In view of these

consequences, is it not competent to show, that the agreement now sought to be enforced, was based upon an agreement made between Wilde and the firm; and may not the prayer of this bill be successfully resisted on the ground, that to compel a specific performance in this case would be hard and inequitable, in consequence of Wilde's violating the agreement upon which the one now in question is founded?

Suppose, that immediately after making this agreement, Wilde had abandoned the one he had entered into with the firm, would it not have been a clear fraud for him to have turned around upon the defendant, and demanded of him an execution of his agreement? The complainant stands in no better situation than Wilde himself would have stood, had he filed the bill. If Wilde abandoned the agreement he made with the firm—the one he made with the defendant being based upon the former, and having been executed for the purpose of carrying it out—the defendant may successfully resist a specific performance, on the ground of such abandonment. Wilde did not carry out the agreement of January, 1841. He abandoned it, as is conclusively shown from the fact, that in making out a schedule of his property in his application for the benefit of the bankrupt law, he claimed no benefit under that agreement. This is shown also from other abundant testimony in the cause which it is unnecessary to refer to, as the fact was not disputed on the argument. Upon this view of the case, my opinion is, the complainant is not entitled to call for a specific performance.

But let us examine further, and see how the equity of the case is affected by the conduct of the complainant himself.

A want of mutuality is an objection to a decree for specific performance in this case. Let us see how far the court has carried this objection.

In the case of *Hatton v. Gray*, 2 *Ch. Ca.* 164, Hatton sold houses to Gray for two thousand pounds. The note of the agreement was signed by Gray only. The solicitor said in argument, "The note binds not him who signed it not, for

the statute of frauds and perjuries, &c., and therefore in equity cannot bind the other party, for both must be bound or neither of them, in equity." But it was decreed contrary. *Armiger v. Clarke*, *Bunbury's Rep.* 110. The bill was dismissed *per totam curiam*, chiefly upon the principle, that the remedy was not mutual.

In *Owen v. Davies*, 1 *Ves. Sen.* 82, the bill was for a specific performance of an agreement with one since become a lunatic, for the sale of a reversion upon an estate for life. It is apparent, from the report of the case, that the defence insisted on was, that the remedy was not mutual, because the rights of the parties were altered on account of this change in the condition of one of the parties. The Lord Chancellor did not deny the principle contended for. He said "It is certain, that the change of the condition of a person entering into an agreement, by becoming lunatic, will not alter the rights of the parties, which will be the same as before, provided they can come at the remedy. As if the legal estate is vested in Trustees, a court of equity ought to decree a performance; and the act of God should not change the rights of the parties; but if the legal estate be vested in the lunatic himself, that may prevent the remedy in equity, and leave it at law."

In 1 *Atk.* 2, (*Stapilton v. Stapilton*), the general rule was admitted. The mutuality was destroyed by the act of God. The agreement was such that both parties run this same risk. The Lord Chancellor said: "The chance was equal, who died first, Henry or Philip."

In 1 *Schoales and Lefroy* 18, (*Lawrenson v. Butler*), Lord Chancellor Redesdale is for adhering to the rule, as to mutuality, most rigidly. He remarks in that case: "It is said that courts of equity have decreed performance in cases where one party only was bound by the agreement. I believe it would be difficult to find a case where that has been done, particularly a late case. In the case of *Hatton v. Gray*, 2 *Ch. Cas.*, it was considered as sufficient that the agreement should be signed by the party against whom the performance was sought, because such are the words of the

statute of frauds; now, such certainly is the import, that no agreement shall be in force but when it is signed by the party to be charged; but the statute does not say that every agreement so signed shall be enforced; the statute is in the negative. To give it this construction would, as I have heard it urged, make the statute really a statute *of frauds*, for it would enable any person who had procured another to sign an agreement, to make it depend on his own will and pleasure whether it should be an agreement or not."

But this *dictum* of Lord Redesdale, that an agreement signed by one party only, cannot be enforced against that party, is not law. Since this case in *Schoales & Lefroy*, it has frequently been otherwise decided. The master of the rolls in 2 *Jacob & Walker* 428, (*Martin v. Mitchell*), seems to think that the party who had signed, had a *locus penitentiæ*, and was at liberty to recede until the other had signed, or in some manner made it binding upon himself.

In the case of *Flight v. Bolland*, 4 *Russ.* 675, it was decicided that an infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual.

But in *Clayton v. Ashdown*, 2 *Vin.* 393, *pl.* 1, a specific performance made by an infant was decreed, on the ground that the infant had attained his full age, and had affirmed the contract before the bill was filed.

In the cases already referred to, where the suits were maintained or agreements signed only by one party, it was, as was remarked by the master of the rolls in 4 *Russel*, first because the statute of frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual.

From a review of all the authorities, it will appear to be an objection to decreeing a specific performance. That the parties are not mutually bound to fulfil it, and that the court will not enforce such a contract, when the party who is not bound by the agreement, has taken an undue advantage of his position, to the injury of the other party. For instance, if an infant may make a contract mutual by affirm-



ing it after he comes of age; if the property is of a character subject to fluctuation in its value, the court would not allow him to speculate upon his position, and take his own time to affirm the contract. A want of diligence might, under such circumstances, be sufficient ground for the court's refusing its aid.

To apply the rule to the case before us. This contract is mutual in its terms, and there is a mutuality of remedy to the parties. The one agrees to sell at a fixed price, and the other covenants to give it. If either party had died, the mutuality of remedy would not have been destroyed. The representatives of the deceased party would have been bound to fulfil the contract, or if Wilde had sold and assigned his interest, Tompkins could still have enforced the agreement against Wilde. But the moment Wilde's interest in this contract passed into the hands of his assignee in bankruptcy, all reciprocity as to the remedy was destroyed. I am not willing, however, to say, that the mere fact of the mutuality being destroyed under these circumstances, the court, on that account should refuse its aid to enforce a specific performance. Such an application of the rule might contravene the policy of the bankrupt law, by depriving the creditors of a beneficial interest in a valuable part of the bankrupt's estate. But if the assignee, or a person holding under him, seeks a specific performance, he must affirm the contract and make it mutual, at least within a reasonable time. If he takes advantage of his position to speculate upon the opposite party, a court of equity will not encourage or aid him in such speculation. By the terms of the agreement in question, Wilde was entitled to a conveyance of the property on his paying the consideration money, at any time, on or before the 4th of February, 1846. The assignee came into the possession of the contract July 16, 1842. He took no steps towards assuming its responsibilities, or enforcing its fulfilment, but ten months afterwards sold at public auction, all his right, title, and interest in it, to the complainant for three dollars and seventy-five cents.

What was the relative situation of the complainant and

defendant at this time? Here was an agreement which the defendant could enforce against no one. It related to property, from its very character fluctuating in its value. Could the complainant rest upon his oars until February, 1846; then, if in the mean time the property doubled in value, demand it at his pleasure, of the defendant: or if it became valueless, be at liberty to cast it, a burthen upon him, without any means of redress for such a wrong? And all this without any negligence, or want of foresight in the defendant. The contract was made before the bankrupt law was passed, and of course the defendant could not anticipate, and therefore, did not provide against such a contingency.

Would it be equitable under such circumstances, for this court to countenance the complainant in taking advantage of his position, and in speculating upon the defendant; and more especially, when he risks only three dollars and seventy-five cents in the adventure?

The complainant waited until the 7th of October, 1845, about four months before the time for executing the contract expired, and for more than three years after his purchase, and then formally tendered himself ready to assume its responsibilities. In the meantime the property increased some fifty per cent. in value.

My conclusion is, the bill must be dismissed. but without costs. I am induced to make the decree without costs, in consequence of the conduct of the defendant when he was called upon to perform the contract, and on account of which he is, in a measure, responsible, for the institution of this suit.



JOSHUA RAWNSLEY and ANDREW BARRICKLO *v.* THE TRENTON MUTUAL LIFE AND FIRE INSURANCE COMPANY.

Where it is manifest from the answer, that an incorporated company is largely in debt, and has no available means or credit to enable it to meet its engagements, it is the plain duty of the court, and one of the leading objects of "the act to prevent frauds by incorporated companies," to secure to the creditors of the insolvent company, an equal distribution of its assets.

Under such circumstances, the company will be declared insolvent, and the court will apply to it such provisions of the act, as it shall deem advisable for the best interest of all concerned. But it does not follow that receivers should be appointed.

The application refused, where neither the protection of the public, nor the interest of the creditors or stockholders required it. See *Oakley v. The Paterson Bank*, 1 *Gr. Ch. R.* 178.

This was a bill for injunction and receivers, under "the act to prevent frauds by incorporated companies." The original bill was filed May 11th, 1852. The case was argued and the application refused, May term, 1852. (*Stn. Ch. R.* 95.) The complainants filed an amended bill July 13, 1852. The cause was heard on the pleadings and proofs.

Messrs. *Beasley* and *Halsted* for complainants.

Messrs. *Dayton* and *Vroom* for defendants.

THE CHANCELLOR. By the act entitled "An Act to Prevent Frauds by Incorporated Companies," it is declared, that if, after hearing the proofs and allegations of the parties, and upon inquiry into the matters or cause of complaint, it shall appear to the Chancellor, that the said company has become insolvent, and shall not be about to resume its business in a short time thereafter, with safety to the public, and advantage to the stockholders, it shall and may be lawful for the Chancellor to issue an injunction.

It is manifest from the answer of the defendants, that this company is largely in debt, and has no available means, nor



credit, to enable it to meet its engagements. Its ability to pay, depends upon the ability of others, who are its debtors. These debtors refuse to pay, and insist they are not legally bound to do so. So that this company is, at present, deprived of all the means to which the charter seems to look as the available fund, to meet its engagements. Let us examine the answer, to ascertain the actual pecuniary condition of this company.

It does not appear by the answer, but the contrary is fairly to be inferred from its statements, that there is, at this time, one dollar in the treasury of the company, to meet its engagements. Its liabilities are large. Its creditors have resorted to the law, and brought suits against it. Judgments are obtained, and the company has had recourse to the premium notes, and to an assessment upon the policies. The amounts of the premium notes, and the policy assessment is large enough to pay the debts. But these debtors refuse to pay, and the answer states, that this failure on the part of the members to fulfil their engagements, has brought them into difficulty, and until removed, will render the company unable to pay its losses. The ability of the company to meet its demands, depends upon the ability of its debtors, who are now resisting the demands made against them, on the ground that, at law, they are not legally liable. This company, then, presents the unpromising aspect, of being largely in debt—of depending upon a large number of debtors for its ability to meet its liabilites—these debtors, scattered in all parts of the country, each indebted in small amounts, and, in a body, making one common cause of resistence against the claims made upon them by the company. It is now more than a year since these embarrassments came upon the company, and since it was ascertained that it would be necessary to look to the premium notes, and the assessment against the policy holders for relief; yet it does not appear that the company has been able to collect a dollar from either of these sources. It is evident, the company cannot resume its business in a short time, with safety to the public, and advantage to the stockholders.



It may be that the company will ultimately pay its debts; for, if the premium notes and assessment should fail, the guarranty capital will, in all probability, be sufficient to discharge the liabilities. But this guarranty constitutes a fund not provided by the charter. It is insisted, that it can only be resorted to after the other resources of the company have failed and are exhausted. It is manifest, from the whole case, that this capital ought not to be looked upon as a fund *in hand*, which can be turned to account at any moment. It is not for me to decide now, when, or in what manner, or to what extent, this capital can be resorted to. This company is now embarrassed—it cannot meet its engagements—the fund to which its charter gives it recourse, under such circumstances, is withheld—it has not a dollar at its command.

What is the plain duty of the court, under such a state of things? One of the leading objects of the "act to prevent frauds by incorporated companies" is, to secure to the creditors of the insolvent company, an equal distribution of its assets. Suppose the court withdraws its hand from this company, what will be the consequence? It will go on and prefer such creditors as it may select, and ultimately, if not successful in collecting its debts, its other creditors must be the losers. Situated as this company is, have not its creditors a right to the protection of the court, in securing to them an equal distribution of its assets?

It is further manifest, from the facts before me, that this company ought not to be permitted, under its present embarrassments, to resume its business of insuring. It is true, it appears, that it is not the intention of the present directors to do so. But they may change their minds, or the present directors may be displaced by others. The safety of the public, as well as the interest of the stockholders, demand the security which this court only can give them, and which the legislature has provided.

For the purpose of subjecting the company to the salutary provisions of the statute, I feel bound to declare the company, in the contemplation of the act referred to, insolvent, and to apply to it such provisions of that act, as I may deem

advisable, for the best interest of all concerned. But it does not follow, that receivers should be appointed. The act declares, that it shall and may be lawful for the Court of Chancery, *if the circumstances of the case, and the ends of justice require it*, at the time of ordering the injunction, to appoint a receiver or receivers.

It does not follow, that because an injunction is granted, receivers should be appointed. In 1 *Green's Ch. R.* 178, *Oakly v. The Paterson Bank*, Chancellor Pennington says, "I am now moved, under the 8th section of the aforesaid act, to appoint receivers to take charge of the effects, and wind up the concerns of the bank. This I am authorized to do, 'if the circumstances of the case, and the ends of justice require it.' This authority is a delicate one to be exercised. * * * * * * The effect of appointing receivers, is to take the property out of the hands and control of those persons to whom the stockholders * * * * * have confided it. After the best reflection in my power to bestow on the subject, I have come to the conclusion, that receivers ought not to be appointed. It by no means follows, that because an injunction is granted, receivers should be appointed. They are independent questions."

The protection of the public does not require that, in this case, receivers should be appointed; nor is this course necessary for the interest either of the creditors or stockholders. On the contrary, it appears to me, that no one, a stranger to the extensive business of the company, can advantageously wind up its concerns. Some of the directors have a deep interest to see that the debts of the company are diligently and expeditiously collected. Self-interest will prompt them to energetic measures in closing its affairs.

The management being left in the hands of the directors, they will hereafter act under the immediate control and direction of the court. They will be enjoined from exercising any of the franchises of the company, except so far as may be necessary, in the most expeditious and economical manner, to collect its dues and pay its debts. They will be required from time to time, to make such report, as will

keep the Chancellor advised of the condition of the company, and accomplish the ends contemplated by the act of the legislature.

It was urged, as a strong objection against leaving the directors in the management, that they, or some of them, had been guilty of gross frauds. If there was any evidence of this, it would be a sufficient reason for their immediate removal. But I feel bound to say, that after a very careful examination of the answer put in by the president and treasurer, that any charge of fraud, made by the bill, has been fully and fairly met. There may have been indiscretion on the part of the directors, but there is nothing in this case, taking the explanations of the answer, to justify the charge of fraud. The withdrawal of a part of the guarranty capital is satisfactorily explained. As to the remuneration received by those who furnished this capital, it has proved a very inadequate premium for the risk they ran. The individuals whose obligations the company now hold for fifty thousand dollars, it is not pretended, are any of them irresponsible for the amount of their respective engagements. This capital has increased the security of the creditors of the company, and as far as the stockholders were concerned they made no objection to this mode of the company's increasing their business, until misfortune overtook the company.

Nor do I consider that it is any objection to the present directors continuing in the management, because the interest of the policy holders and of the individuals who are liable for the guarranty capital is antagonistical. The policy holders will resist the payment of their premium notes and assessments, as well in the hands of a receiver of this court as of the directors. They can make their defence, if they have any, as well in one case as the other. That they will be prosecuted with more perseverence by the directors, is a strong argument why the directors should not be disturbed. That there is a question between these conflicting interests, as to which is primarily liable, is no reason why the directors should be displaced. That question will, in proper time, be settled by this court. As soon as the debts due the com-

pany are collected, and the directors make their report of assets on hand, and available, and the debts of the company are ascertained, there will be a distribution of the fund among the creditors; so that in this way the issue must be made as to how, and under what circumstances, the guarranty capital is to be made liable.

I shall, therefore, make an order, declaring the company insolvent, under the act entitled "An act to prevent frauds by incorporated companies;" and I shall make a further order, that the directors lay before the court, on or before the first day of September next, under the oath of the president and treasurer, "a full and complete inventory of all the estate, property, and effects of the company; its nature and probable value, and an account of all the debts due from the said company, and of the debts due to it;" and also to make report of their proceedings to the court every six months thereafter. These are the duties required of receivers under the 11th section of the act referred to.

It will be in the power of the court, at any time hereafter whenever the circumstances of the case, and the ends of justice require it, to appoint a receiver under the provisions of the act; and whenever any such collision shall occur, between such of the directors as are guarrantors of the guarranty stock, and the policy holders, or the individuals who have given premium notes, as to render the discharge of the duties imposed upon the directors by the court, incompatible with the rights of others interested in the company, it will be time enough for the court to interpose. I do not apprehend any such collision.

WILLIAM WISHAM and JACOB S. KAY *v.* NATHANIEL LIPPINCOTT AND OTHERS.

A joint creditor cannot be compelled in equity to proceed against the joint estate, before resorting to the separate estate of an individual member of the firm, (by the partner whose separate estate is resorted to.) This would be inconsistent with the well established principle that a partnership contract is several as well as joint.

Where, on an application to dissolve an injunction, it appeared that the defendants who had answered, denied the fraud charged in the bill, but other defendants, more deeply interested in getting the injunction dissolved, remained silent, the court would not grant the motion. The complainants were entitled to the answer of the other defendants.

The principle that "the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything," cannot apply to creditors who have secured their debts by judgment and execution liens.

The correctness of the principle, as a general rule, doubted.

Motion to dissolve injunction on bill and answer.

Messrs. *Dudley* and *Dayton* for motion.

Mr. *Browning* contra.

THE CHANCELLOR. This bill is exhibited by William isham, a partner of some of the defendants in the suit, and Jacob S. Kay, a separate creditor of Wisham. The de- dants are, some of them, the partners of Wisham, and the ers are the creditors of the firm.

The partners own several tracts of land in the county of lington. John Winship recovered a judgment in the Su- me Court against the firm, and caused execution to be ed thereon, and a levy to be made on the said real estate e county of Burlington. William Wisham is the owner onsiderable real estate in the county of Camden, in his right, which he conveyed to the other complainant, to secure a debt he owed him; and at the time of such yance took from Kay an agreement to reconvey the rty when the debt should be satisfied.

The bill alleges, that the partnership property which is levied on is sufficient to pay Winship's judgment, and that for the purpose of raising the debts of Wisham's individual property, and to embarrass and overreach him, Winship had been induced, by the other partners, to have issued, on his judgment, a *testatum fi. fa.* into the county of Camden, and a levy to be made on Wisham's real estate there. The prayer of the bill is, that the sheriff of Camden may be restrained from making sale of the real estate in the county of Camden, and the partners be decreed to account for the partnership concerns, &c.

On filing the bill, an injunction was issued. The judgment creditors have not answered. The other defendants have, and relying on their answers, now move for a dissolution of the injunction.

The complainants rely upon the principle, that a joint creditor may be compelled, in equity, to proceed against the joint estate, before he will be permitted to resort to the separate estate of an individual member of the firm. As a general rule, he cannot be compelled to do so, by the partner whose separate estate is resorted to. This would be inconsistent with the principle, now well established, that a partnership contract is several, as well as joint.

In *Wilkinson v. Henderson*, (1 *Mylne & Keene*, 582,) in a suit by a joint creditor, against the representatives of a deceased partner, and the surviving partner, the plaintiff was held to be entitled to satisfaction out of the assets of the deceased partner, though it was not proved that the surviving partner was insolvent. On behalf of the executors of the deceased partner, it was insisted, that the equities, in respect of creditors, were, that joint debts should be satisfied out of the joint estate, and that the separate estate of the partners should not be liable to the demands of the creditors, until the insufficiency or insolvency of the joint estate was established. In answer, the principle was relied upon, "that all contracts with partners are joint and several." The master of the rolls decided, that the plaintiff was entitled to a decree for the benefit of himself, and all other

joint creditors, out of the assets of the deceased partner, and that the creditors were not compelled to pursue the surviving partner, in the first instance. (*See also note* 1 *Story*, § 676.)

Now, it is manifest, that the remedy of a joint creditor cannot be less circumscribed against the estate of a living than of a deceased member of the firm. If a court of equity will lend its aid to a creditor of the firm, to collect his debt from the representative of a deceased partner, without compelling him, in the first instance, to pursue the surviving partners; much less will it interfere with such a creditor who has a lien for his debt upon the separate estate of a partner living, and compel him first to exhaust the partnership assets. As was remarked, by counsel in the case of Wilkinson and Henderson, no prejudice can accrue to the separate partner, by holding that the creditor has a right to come upon his estate, in the first instance, for satisfaction of his demands, for, if the other partners be solvent, the partner whose estate is taken, will have a remedy over, according to the subsisting equities; and if the other partners be insolvent, then the estate of the partner pursued, is liable to make full satisfaction to the creditor.

Wisham, then, is not entitled to maintain this bill, upon the principle that a partner can compel a partnership creditor first to resort to the partnership estate. He must show some other ground of equity, before the court will interfere. He alleges fraud—he charges that his copartners, and their creditors, have fraudulently combined to defraud him. This charge the defendants, who have answered, deny. But, on their answer, I ought not to dissolve the injunction. The complainants are entitled to the answers of the other defendants. Their silence gives color to the charge. They are the most deeply interested in getting this injunction dissolved; and if they are entirely free from the charges made against them, it is a reasonable expectation that they would have promptly answered the bill. There is another ground of equity. The creditor has actually seized upon two funds for the payment of his debt. The complainants say, that



the manner in which he has pursued his remedy against the two funds, makes it equitable that he should exhaust the fund belonging to the joint estate first; because, upon it there are no other liens, and it is sufficient to pay the debt.

As to the rights of the complainant, Kay, who is a separate creditor of Wisham. It is insisted, that he is entitled to be first paid out of the effects of his debtor, before the joint creditor of the firm can claim any thing. This would seem to be in conformity to the principle stated in 1 *Story*, § 675, that "the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor, before the partnership creditors can claim any thing." But this principle cannot apply to creditors who have secured their debts by judgment and execution liens, and occupying the relative position of the parties in this suit. If so, it utterly annuls and destroys the principle before stated, that every partnership debt is joint and several. I doubt very much its correctness, as a general rule. A Court of Chancery may, undoubtedly, where the equities between the partners are to be adjusted, and where the assets are before the court, and the court called upon to marshal them, apply such a rule. *Story*, § 676, *note* 1, says, "If the true doctrine be, that a partnership contract is several, as well as joint, then there seems no ground to make any difference whatsoever, in any case between joint and several creditors, as to payment out of joint or separate assets." He adds, "This is now the established doctrine." I have no hesitation in saying, that when a joint creditor of the firm has a judgment, and execution levied upon the separate effects of one of the partners, this court ought not, in mere compliance with any such rule, as that the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor before the partnership creditors can claim any thing, interfere with such execution, either on the application of any one of the partners, or any creditor of the firm, or separate creditor of any of its mem-



have remarked already, there is, in this case, some-
sides the application of such a rule, entitling the
iants to the interference of the court.
iotion to dissolve is denied.

HENRY MCCALL, Jr. *v.* JOHN YARD AND OTHERS.

In a bill to foreclose a mortgage, the rights of all incumbrancers at the commencement of the suit, not made parties, are not bound, or affected by the decree.

If the first mortgagee brings a bill to foreclose against the mortgagor, and obtains a decree, without making subsequent incumbrancers parties, their rights are not foreclosed. And their remedies still remain against a purchaser, claiming under the decree. (*Canby v. Ridgway, October term*, 1826.)

On motion to dissolve injuction upon answer.

W. Halsted for motion.

Beasley and *P. D. Vroom* contra.

THE CHANCELLOR. I assume, that the deed from Glentworth and wife to Waln, of the 1st January, 1831, embraces the land in controversy. Although this was denied by the complainant's counsel on the argument, it is not made a question by the pleadings, and for the purposes of this motion should be considered as conceded.

The defendant claims title through Elizabeth Marshall, by virtue of two mortgages executed to her by Glentworth and wife—one dated October 20, 1829; the other July 14, 1827.

Elizabeth Marshall assigned her mortgages to "The Trenton Banking Company." The bank filed a bill for the foreclosure and sale of the mortgaged premises. The only parties defendants, were the devisees and heirs at law, of the mortgagor. A decree for sale was made April 8, 1834, and "The Trenton Banking Company" purchased the property at the sheriff's sale, under that decree. By sundry mesne conveyances, under this purchaser, the defendant derived his title to the property.

The complainant, who holds under the deed to Waln of 1831—who was not made a party to the suit in chancery, and who, it is admitted, is in possesson, files his bill and ask



that the rights of Waln, which he alleges were not foreclosed or interfered with by the proceedings in chancery, may be ascertained and established; the complainant tendering himself ready to redeem, or submit to such terms, for the purpose of securing his rights, as the court may deem equitable and just. He asks that the defendant, in the meantime, may be restrained from prosecuting against him a suit at law, for the injury done by the complainant's using and occupying the land, by overflowing it with the back water from his mill pond.

These are the outlines of the case. The defendant meets the complainant at its threshold, by denying that the complainant has any rights. It is insisted, that the decree in chancery foreclosed and barred all the rights which the complainant now sets up, and that it was not necessary to make Waln a party to the suit, because the conveyance from Glentworth and wife to him, was subsequent to the mortgage upon which the suit in equity was instituted.

I do not consider this an open question in New Jersey. It received a most thorough investigation by the late Chancellor Williamson, in the case of *Canby v. Ridgway*, *October term*, 1826. Ridgway, the holder of the first mortgage, filed his bill to foreclose, &c., but did not make Canby, who held a second mortgage, a party. The Chancellor says: "From an attentive examination of the authorities, and of the correct practice of the court, I am satisfied that it was the duty of Ridgway, in order to have made his decree effectual against the complainant, and the other incumbrancers, to have made them parties to his bill. The rule has been long and conclusively settled, that in a bill to foreclose a mortgage, the rights of all incumbrancers at the commencement of the suit, not made parties, are not barred or affected by the decree." After reviewing a great number of authorities, the Chancellor concludes: "If the first mortgagee brings a bill to foreclose against the mortgagor, and obtains a decree, without making subsequent incumbrancers parties, their rights are not foreclosed, and their remedies still remain against a purchaser claiming under the decree." On



appeal to the the Court of Errors, this decision was affirmed in May term, 1829.

What the complainant's particular equities are in this case —or whether he is entitled to a decree in his favor, are matters which I am not now called upon to decide. There are many facts and circumstances involved in the case, which may very materially affect these questions, and which, upon the motion now before me to dissolve the injunction, I do not feel myself called upon to examine.

The rights which the complainant asks the court to protect, were not foreclosed by the decree under which the defendant claims. Those rights can only be ascertained and established here. He has sought the proper tribunal for protection, and he ought not to be disturbed in his possession by the defendant, until the equities of the parties are settled. Should the final decree be against the complainant, it will settle the controversy at law. He admits, that he backs the water on the land. If he cannot be protected in doing so, by the equity he sets up here, he has no further defence to the suit.

The motion is denied without costs.



Between JACOB HINCHMAN, complainant, and ELLEN STILES AND OTHERS, defendants.

The principle is well settled, that a widow is entitled to her dower in an equity of redemption.

If land is sold under a prior mortgage, in which the wife joined, and the husband is dead at the time of foreclosure and sale, the court will protect the widow's thirds to the surplus, against a mortgagee whose mortgage she did not unite with her husband in executing.

But a second mortgage cannot be postponed to a third; it does not lose its priority from the mere fact that the wife did not sign it. The husband has the right to mortgage his interest in the land, without his wife's consent, and a third mortgage can derive no superiority on that interest to the second mortgage, because he has procured a lien on the further rights of the wife.

This was a bill to foreclose, filed by the complainant, August 6th, 1852. The cause was set down for hearing, upon the bill, and the answer filed by Ellen Stiles.

Teneyck for complainant.

Dudley for defendants.

THE CHANCELLOR. David Stiles, before his marriage with Ellen Stiles, one of the defendants, on the fifth of March, 1849, made and executed a mortgage to Benjamin H. Lippincott, on a tract of land in the county of Burlington, to secure a debt of one hundred and forty-four dollars. This mortgage was afterwards assigned to the trustees of Griffith M. Roberts, who now hold the same, and who are defendants in this suit.

On the 24th day of April, 1849, which was after his marriage with the said defendant Ellen, David Stiles made and executed a mortgage to the defendant, Rebecca Slim, to secure a debt of four hundred dollars. Ellen, his wife, did not join in this mortgage. It did not cover the lot mortgaged to Lippincott, but was on a tract of land adjoining the

On the first day of April, 1850, David Stiles, and Ellen his wife, mortgaged to the complainant both tracts of land embraced in Lippincott's and Rebecca Slim's mortgages, to secure a debt of one thousand dollars.

The bill is filed on this third mortgage. David Stiles is dead. His widow, Ellen, is made a defendant, and has answered the bill. The other mortgagees above named are also made parties, and several judgment creditors whose liens are subsequent to the mortgages.

The widow has no rights to be protected as against the *first* and *third* mortgages. The first was executed before her marriage with the mortgagor; and in the execution of the third, she joined with her husband, in the manner prescribed by the statute. But as against the mortgage second in priority, which was not signed by her, she insists her dower right is to be protected.

The principle is well settled in New Jersey, and I believe, very generally in American courts, that a widow is entitled to her dower in an equity of redemption. A court of equity will always protect her rights, and not allow them to be defeated by any technical rules. If she has an interest in the premises, and has not mortgaged it, the mortgagee has no right to appropriate it to pay his debt. If the land is sold under a prior mortgage, in which the wife joined, and the husband is dead at the time of foreclosure and sale, the court will protect the widow's thirds to the surplus, against a mortgagee whose mortgage she did not unite with her husband in executing. In *Titus v. Neilson and others*, 5 *Johns. Ch. R.* 452, the wife of the mortgagor joined in a mortgage in fee; the mortgagor afterwards executed a second mortgage, in which the wife refused to join. A bill was filed on the first mortgage, and a decree made for sale, but before sale the mortgagor died. The widow filed her petition and it was held, that she was entitled to her dower out of the surplus proceeds remaining, after the first mortgage debt was satisfied. The principle is recognized in *Table Tab'e*, 1 *Johns. Ch. R.* 45; *Hawley v. Bradford*, 9 *Paige* 200; *Bell v. The Mayor, &c., of New York*, 10 *Paige* 49; *Hart*

horne v. Hartshorne, 1 *Green's Ch.* 349; besides which, numerous other authorities might be cited.

The difficulty in this case is here. The bill is filed by the third mortgagee. It is the intervening mortgage—the second mortgage—that was not executed by the widow. The widow, by her answer, insists, that the first and third mortgages are first to be paid, and that after her costs are paid out of the surplus, the second mortgagee must take two-thirds of the residue, and the one-third must be invested for her benefit. And so her counsel contended on the argument. But on what principle can the second mortgage be postponed to the third? It does not lose its priority of payment, from the mere fact that the wife did not sign it. The husband had the right to mortgage his interest in the land without his wife's consent, and a third mortgagee can derive no superiority over that interest to the second mortgagee, because he has procured a lien upon the further rights of the wife.

The amount due on the first mortgage, together with that mortgagee's costs, must be first paid out of the proceeds of the lot which the mortgage covers. If there is more than sufficient for that purpose, the residue, or so much thereof as is necessary, must be appropriated to pay, first, the third mortgagee's costs, and then his mortgage. If the proceeds of the sale of the one lot pays off the first and third mortgages, there is no difficulty. Out of the proceeds of the other lot, the widow's costs of this suit must first be paid, and one-third of the residue must be invested so that she may receive the interest during her life. The balance goes to pay the second mortgage, and if not sufficient for the purpose, the mortgagee, at the death of the widow, will be entitled to the principal invested for the widow's benefit, or so much of it as will be required to satisfy his claim. But suppose the third mortgage is not paid by the proceeds of the sale of the first lot, how then are the rights between the second mortgagee and the widow to be settled, consistent with the rights of the third mortgagee? The second mortgagee says, "I am willing the widow's costs should be

paid out of the fund. I will take two-thirds of the surplus, and the other third must be invested for the widow's benefit during her life." But to this, the third mortgagee objects. His mortgage covers all the widow's interest in the fund, and her costs cannot be paid out of the fund, nor can an investment of any part of it be made for her benefit, until the third mortgage is discharged. Nor can the third mortgagee claim any of the fund until the prior incumbrance (the second mortgage) is discharged. There is no question in litigation between the second and third mortgagees. They make no point in the case.

The mortgages must be paid according to their priority. Should there be a surplus after paying all the mortgages, the widow, perhaps, may claim something more than the one-third of the surplus. She may be entitled to her costs, and to have the amount of her interest in the fund, which went to pay the second mortgage, first deducted, and also to have the one-third of the balance. But I have not well considered this point. When the property comes to be sold it may be unnecessary to do so.

Let a master state the accounts, and let there be a decree for sale, directing the lot embraced in the first mortgage to be first sold, and out of the proceeds let the first mortgagee's costs and the amount due him be paid; and the residue, if any, be appropriated, first, to pay the third mortgagee's costs, and then the amount due on his mortgage. Let the proceeds of the sale of the other lot be brought into court, subject to further directions.

PETER A. JOHNSON v. JAMES TUTTLE AND OTHERS.

The fact that a judgment was allowed to stand open for twenty-four years, when the creditor had under execution, and within his reach, property ample to pay the judgment, is not conclusive that it was satisfied; the indulgence may be explained.

When called upon by a *bona fide* purchaser or mortgagee, a creditor must account for personal property he has levied upon; he must show that it did not go to pay his judgment. The presumption of law is that it did.

This was a bill exhibited against the executors of Jacob Gray, who was a judgment creditor of James Tuttle and others, defendants, to foreclose their rights, and to sell the mortgaged premises.

The cause was put down for hearing on the bill, answer, replications, and proofs.

The state of the case sufficiently appears in the opinion of the Chancellor.

J. J. Scofield and *P. D. Vroom* for the complainant.

A. Whitehead and *W. L. Dayton* for the judgment creditors.

THE CHANCELLOR. The complainant holds two mortgages made and executed by James Tuttle and wife.

On the 26th of May, 1834, James Tuttle was indebted to the complainant in the sum of twelve hundred and fifty dollars. For this amount, Tuttle gave the complainant his promissory note of that date, endorsed by Noadiah P. Thomas, Joseph Bleything, and Charles Ford. To secure its payment, he and his wife executed a mortgage upon lands in Morris county, to one of the endorsers, Noadiah Thomas; and Thomas assigned it to the complainant.

On the 10th of December, 1839, Tuttle, in order further to secure the amount due on the said note, with his wife ex-

ecuted another mortgage to the complainant upon other land in the county of Morris.

On the 20th of December, 1821, Jacob Gray recovered a judgment, in the Inferior Court of Common Pleas of the county of Morris, against James Tuttle, for the sum of two thousand three hundred and two dollars and seventy-two cents, besides costs. Since then, Gray has deceased. The complainant has exhibited this bill against Gray's executors, and others, defendants in the suit, to foreclose their rights, and to sell the mortgaged premises to pay his debt. The contest is in reference to this judgment. The complainant insists, the judgment has been satisfied.

The complainant alleges, that the age of the judgment, in connection with the fact that it was allowed to stand open for twenty-four years, when the creditor had under execution, and within his reach, property ample to pay the judgment, is evidence that it was in some way satisfied between the parties. And some other circumstances are urged, to show that the court ought to come to this conclusion.

The indulgence, which was shown by Gray to Tuttle, is explained. There was a family connection between them—their wives being sisters. The terms on which they lived and their business relations with each other, are sufficient to account for the fact of much leniency, and indulgence on the part of Mr. Gray. But the executors show, by the dealings and settlements between Tuttle and Gray, and between Tuttle and themselves, as well as by the declarations of Tuttle, and numerous letters written by him, that Tuttle, up to the time of his death, which occurred after the the bill was filed, considered and dealt with the judgment as open and unsatisfied. The complainant insists, that the declarations of Tuttle, and his letters are not admissible as evidence against the complainant. The rule that a party cannot offer his own declarations as evidence is not applicable. Tuttle and Gray are brought into this suit, as well adverse to each other as to the complainant. The rights, which Gray is called upon to establish, are adverse to Tuttle's. When Gray is called upon to establish his judgment against Tuttle, Tuttle's

declarations are competent for the purpose. Such declarations are not in favor of the party making them, but against his interest. There is no allegation in the bill of collusion, nor is there any evidence to excite the suspicion that the judgment was kept on foot to defeat the complainant, or for any other unlawful purpose.

It is shown that numerous payments were made on the judgment in large and small sums, from time to time, in money and otherwise. Questions were raised on the argument, as to the admissibility of some of the evidence, on both sides, in reference to these payments, as well as to the effect and sufficiency of it. The complainant insists, that the payments actually proved show the judgment paid. But all these questions will more properly and fairly come up before the master upon a reference.

There is one matter, however, connected with taking the accounts, which I consider, it is proper I should decide now.

In the year 1821, an execution was taken out on this judgment, and by virtue of it, the sheriff levied upon certain personal property belonging to the defendant. From the pleadings in the cause, as well as the evidence, I am satisfied, that both by the rules of law and equity, the personal property so levied upon, was, *pro tanto*, a payment upon the judgment.

If the property so levied upon had been of sufficient value to satisfy the judgment, and so charged in the bill and not denied, I should have declared the judgment satisfied as respects the complainant's mortgages. In *Wood v. Toney*, 6 *Wend.* 562, a perpetual stay of execution was ordered on the application of a *bona fide purchaser* of lands bound by judgment, where it appeared that an execution had been issued and personal property of the defendant in the execution levied upon to an amount sufficient to satisfy the judgment. On a previous application, on behalf of the defendant in execution, the court had, under the circumstances of the case, refused to set the execution aside. The plaintiff in the judgment, or his assignee, had ordered a stay on the

execution, and the property had been left in the hands of the defendant. Without saying that this court will lay it down as a rule, that where a judgment creditor has levied upon personal property sufficient to pay his judgment, he may not relinquish his lien upon it for the benefit of his debtor, without putting in jeopardy his lien on the real estate; I feel clear in declaring the rule in equity to be that when called upon by a *bona fide* purchaser or mortgagee, the creditor must account for the personal property he has levied upon. He must show that it did not go to pay his judgment. The presumption of law is that it did. When the sheriff levies upon property, it is his for the special purpose of paying the execution in his hands. The defendant must be credited *pro tanto*, and the plaintiff must look to the sheriff. If the property has been disposed of, by the fraud of the debtor, or been appropriated to his own use with the consent of the plaintiff; as between the plaintiff and defendant, their respective rights, as to any lien upon real estate, are not affected. As between the plaintiff and a *bona fide* purchaser, or incumbrancer, a different case is presented, and their equities must depend upon the particular circumstances of the case.

In the case of *Luther v. Onondaga C. P.* 19 *Wend.* 79, on an application for a *mandamus* to the pleas, A., defendant in execution, fraudulently removed from the county, property which Luther, as deputy sheriff, had levied upon, and the sheriff was ordered to pay the amount of the execution. He paid it, and took an assignment of the judgment. The court allowed Luther to be subrogated in the place of the plaintiff as against the defendant, but not as against the purchasers of his real estate on subsequent judgments and executions.

In *Hayden v. The Agent of the State Prison at Auburn, &c.*, 1 *Sand. Ch. Rep.* 195, the assistant vice-Chancellor, applied the rule very rigidly, and determined that the levy of an execution upon sufficient personal property to pay it, is a satisfaction of the judgment as to junior incumbrances upon real estate; although in consequence of the sheriff's indulgence to the debtor, and the plaintiff's neglect to enforce it=



the levy actually produces nothing to apply on the execution.

In this case, the bill alleges that certain personal property was levied on, and specifies the property, and prays that the judgment creditor may be compelled to raise and satisfy the amount found due on the judgment, by first selling the personal property levied on, before resorting to the mortgaged premises. It is true, the complainant does not state his rights in the matter with very great precision, but there is enough in the bill to give him the relief to which he is entitled under the circumstances. The defendants admit in their answer, the fact of the levy on the personal property. They make the execution, and accompanying levy exhibits. They do not set up in their answer, that they have not had the full benefit of the personal property levied upon, nor do they give any account of its disposition. It was taken by the sheriff. It was in his custody, and beyond the control of the defendant in execution, for the purpose of paying the judgment. The presumption of law is that it was so appropriated. The complainant having shown that the judgment creditor took the property to pay his judgment, it must be credited on the judgment, unless the defendants show some reason why it should not be. It may be true, as was suggested on the argument, that the levy was made subject to other liens which claimed the property, or that the judgment creditor converted it to his own use. But the law presumes no such thing; and if any reason exists, why the amount of this property, which the creditor took by process of law to pay the judgment, was not so appropriated, it should have been set up in the answer, and been proved. Jacob Wilson, the sheriff who had the execution, says: He made the levy and returned the execution. He thinks he did nothing with the execution after the levy, until 1840, when he advertised and adjourned from time to time, until he had notice that there was an injunction. He says, he does not know what became of the personal property that he levied on. It was not very common for him to let the property remain without sale, without orders from the plaintiffs. Upon such evidence, can

there be a doubt, that if the question was between the plaintiff and defendant in execution, the defendant would be entitled to a credit, to the amount of the value of the property levied on? The complainant stands on much better ground. He is a *bona fide* purchaser for a full consideration. The injunction issued in this case did not stay the sale of the personal property; it only enjoined the sheriff from selling the mortgaged premises.

As to the release to Rodgers, and the sale by Tuttle to Howell, I do not see that the judgment creditor can be prejudiced by them. The complainant in his bill sets up no equity in reference to these matters, and no question in relation to them is put in issue by the pleadings. They are introduced into the answer for the purpose of showing that Tuttle dealt with the judgment as open and unsatisfied.

Let there be a reference to a master to take an account of what is due to the complainant on his mortgages, and also the amount due on the judgment, with directions to credit on the jndgment the proceeds of the sale of the personal property levied on; or if there has been no sale, then the value of the property, except such part of it as the defendants can show was not appropriated to their judgment, and the benefit of which they were deprived, through no negligence or default of their own, or that of the sheriff.

JOHN MCKELWAY *et al.* *v.* THE NEW ENGLAND MANUFACTURING CO., of South Trenton, and others.

Where the funds in the hands of receivers for distribution among the creditors of a company, after paying prior incumbrances, amounted to much more than sufficient to satisfy the claims of the complainants, and it appeared by the bill that there was a fund in Court raised out of the property of the mortgagors, by a decree of this Court, for the very purpose of paying, with other debts of the company, those due to the complainants, it was held to be inequitable to permit the complainants to enforce their claims against other lands; sufficient lands of the mortgager's having already been sold, under a decree of the Court, to satisfy their mortgages.

Where two creditors, have liens, the one on two funds of a debtor, and the other on one of them only; the creditor having the lien on the two will, in equity, not be permitted to invade the common fund until he has exhausted the other. But this principle is not applicable where mortgagees object to the payment of a prior mortgage out of a common fund, raised in part by the sale of the mortgaged premises, there being no allegation in the bill that the property sold did not bring enough to pay off the first mortgage. If it did, then the money taken out of the common fund to pay the first mortgage, will, in equity, be taken as *that portion* of the fund realized from the sale of the mortgaged premises.

The bill alleges: That on the 28th March, 1833, the Trenton Delaware Falls Co. purchased of S. R. Hamilton and wife, and John McKelway and wife, about 17 acres of land, in the township of N., in the county of B., at the time subject to a mortgage by Peter A. Hargous to N. Belleville, dated 27th Nov., 1835, to secure $3000, and which mortgage was subsequently assigned to Robert McCall.

That the said Company, on or about the 20th day of January, 1837, became seized, by purchase, of other tracts of land; one tract on the route of the Branch Raceway in the township of N., aforesaid, one other tract being the Raceway in the counties of Hunterdon and Burlington.

That the said company being indebted to the Trenton Banking Company, about 2d April, 1833, mortgaged to the bank all its real estate in the counties of Hunterdon and Burlington, to secure the sum of $4000; and about same

time made a second mortgage to the said bank on all their said real estate to secure the further sum of $6,700.

That after the execution of the said mortgages, to wit, on the 20th March, 1840, the Falls Co. purchased of Budd Sterling and wife, for $300, one acre in the said township of N.

That on the 1st day of January, 1841, the said Falls Co. purchased of Peter T. Smith, for $1312.88, three tracts of land situate in the county of Mercer.

That the receivers appointed by this Court under the decree of Nov. 7, 1843, sold all the premises of the said Falls Co. for $50,000, and the proceeds have been appropriated by them to the payment of the Hargous mortgage, and the Trenton Banking Company's mortgage and judgment.

That about the 22d May, 1834, the Trenton Banking Company recovered judgment against the Falls Company for $5237.87, and levied on lands purchased of T. B. Sartori, and also one of the lots purchased of P. T. Smith, and on all the real estate of the Falls Company, without describing it: and that the said levy included the lot of land afterwards released and conveyed by the Falls Company to Brown, Hansen and Benson, and that the same are subject to the Hargous mortgage and the bank judgment.

That the said Falls Company having become embarrassed, a bill was filed by one Andrew Carrigan, on 29th May, 1843, and on the 9th June of same year receivers were appointed.

That on the 20th day of February, 1844, the receivers sold all the real estate and property of the said Falls Company, under an order of the Court, and which sale was afterwards ratified, and by the report of a master, there remained in the hands of the receivers, after deducting their disbursements and commissions, $49,751.82.

That the receivers reported to the Court that they had proceeded to ascertain the amount and priority of the several mortgage and judgment debts, and that Schedule A, annexed to said report, contained a statement of the several claims which had been presented to them; and that Schedule B contained a statement of the order and priority of the mortgage and judgment, debts, &c.

That in said Schedule B the Hargous mortgage is stated as first entitled to priority of payment, and the two mortgages, and a judgment to the Trenton Bank next entitled to priority.

That by a decree of the Court, the receivers paid out of the said funds in their hands, the mortgage and judgment debts due the bank, and also the Hargous mortgage.

That in 1839, while the Hargous and bank mortgages and bank judgment were liens unpaid, the Falls Company made an indenture of sale or release to David S. Brown, William R. Hansen, and John C. Benson, of a mill site, being part of the 17 acres before mentioned, and covered by the Hargous mortgage.

That the consideration in the deed is $1666.66, and yet no part of the same was ever paid by the said grantees, or in any way secured to be paid; and that the said Brown, Hansen and Benson had notice, actual or constructive, of the said incumbrances, at the time of the conveyance to them.

That on the 14th of January, 1843, the Falls Company sold and conveyed part of the 17 acre tract to Xenophon J. Maynard, and while it was subject to the said mortgage and judgment liens.

That about the 3d of February, 1843, and before the said mortgages and judgment were paid off as aforesaid, the said Falls Company conveyed a mill site, part of the said 17 acres, to Thos. J. Stryker.

That the said land so conveyed to Brown, Hansen and Benson, to Maynard, and to Stryker, ought to have been made to contribute its proportion toward the payment of the said mortgages and judgment; and yet the same were paid out of the general fund in the hands of the receivers.

That although the said mortgages and judgment have been paid, the same are still uncancelled of record.

That in 1841 Benson conveyed his interest in the said tract to Brown and Hansen, and they conveyed to the New England Manufacturing Company.

That the said Falls Company being justly indebted to the

complainants and other persons, on the 2d day of June, 1836, executed to their said creditors a mortgage upon all the lands and tenements which had been purchased or appropriated by the said Falls Company, by virtue and in pursuance of their act of incorporation, and not theretofore conveyed by them to other persons, situate in the townships of Ewing and Trenton, in the county of Hunterdon, and in the township of Nottingham, in the county of Burlington, and which mortgage was executed to secure to the individuals therein mentioned the respective sums therein named, making in all the sum of $9,220.97.

That on the 4th of June, 1836, the said company executed another mortgage on the same premises to Armitage, Green and others, to secure the several sums therein mentioned, and to the individuals therein named, making in all the sum of $7,395.45.

That the funds with which the receivers paid the Hargous and bank mortages and judgment, were raised and made from the proceeds of the sale of the real estate of the said Falls Company, on which the complainants' mortgages were incumbrances.

That the said Hargous mortgage and the bank mortgage and judgment being liens, as well on the property sold to Brown, Hansen & Benson, to Maynard, and to Striker, as well as on the real estate mortgaged to the complainants, ought to have called upon the owners of those respective lots to contribute their rateable proportion. But that these mortgages and judgments having been paid out of funds, the proceeds of sales of land on which the complainants' mortgage was a lien, and thus depriving the complainants of the benefit of their incumbrance and lien, the complainants ought to be permitted to stand in the place and stead of these mortgagees for the amount or proportion to which the said lots so sold Brown, Hansen & Benson, Maynard and Stryker, would have been liable to contribute towards the payment of the said mortgages and judgment, in case the said mortgagees had proceeded to compel the said mortgaged land to bear its rateable portion.

The bill further charges, that the said premises, conveyed to Brown, Hansen & Benson, Maynard and Stryker, are situated in the county of Burlington, and that although the mortgages of complainants purport to embrace all the real estate of the Falls Company, as well in the county of Burlington as in the county of Hunterdon, yet the same were recorded only in the county of Hunterdon, by reason whereof the said mortgages were not liens or incumbrances on the land conveyed to Brown, Hansen & Benson, Maynard and Stryker, which were situated in the county of Hunterdon. But, as to this allegation, the bill was amended, and it is charged in the amended bill, that Brown, Hansen & Benson, Maynard and Stryker, at the time of the respective conveyances to them, had notice of the mortgages held by complainants.

The prayer of the bill is, that the complainants may be decreed to stand in the place and stead of Robert McCall, who held the Hargous mortgage at the time it was paid off, and of the Trenton Banking Company, and may be entitled to receive of and from the New England Manufacturing Company, (grantees of Brown, Hansen & Benson), Xenophon J. Maynard, and John Sheppard, (grantees of Thomas J. Stryker), respectively, each a proportionate sum of money as the said Robert McCall and the Trenton Banking Company might have received in case they had proceeded to enforce their liens and incumbrance against the said lots of land so conveyed by the Trenton Delaware Falls Company to the said Maynard, Sheppard, and Brown, Hanson & Benson, and that the said The New England Manufacturing Company, Maynard, and Sheppard, may be decreed to pay to the complainants, respectively, such an amount of money as the said land so conveyed are now worth, or as they were worth, at the time of the said conveyance, or such other sum proportioned to the whole value of the property of the said "The Trenton Delaware Falls Company," out of which the said McCall and the bank received the principal and interest of their said mortgages and judgment, as shall be agreeable to equity. And that the complainants may be permitted, if

necessary, to use the name of the said McCall and his mortgage, and also the name of the said bank and their mortgage and judgment, for the purpose of enforcing them as liens.

This was an amended bill. To the original bill, a general demurrer had been filed, which was sustained. The bill was then amended, according to some suggestions made by the Chancellor in his opinion, but without any intimation by him, that the bill, if amended, could be sustained.

To the amended bill, a general demurrer was filed on behalf of Sheppard, one of the defendants, and another on behalf of "The New England Manufacturing Company."

C. S. Green and *W. L. Dayton* argued in support of the demurrer.

W. Halsted contra.

THE CHANCELLOR. The Hargous mortgage covers seventeen acres of land, in the county of Burlington. It was made to secure $3,000, and is dated the 27th November, 1835.

The bank mortgage is next in priority. It embraces the seventeen acre tract, and all the real estate of the Falls Company, both in the counties of Burlington and Hunterdon.

Next is the bank judgment. The mortgage and judgment together, were for the sum of $11,937.87.

Then come the two mortgages of the complainants—one for the sum of $9,220.92; the other for $7,395.45. These mortgages embraced all the lands of the Falls Company in Hunterdon and Burlington counties, which had been purchased and appropriated by the company, by virtue of their act of incorporation.

It does not appear by the bill, that there were any other incumbrances on the real estate of the Falls Company, nor that the company owed any debts, except those thus secured by these liens.

The funds in the hands of the receivers, for distribution among the creditors of the company, amounted to $49,751.82 —

The receivers paid out of this sum $24,091.89, in liquidation of the Hargous mortgage and the bank mortgage and judgment. This left a balance in their hands of $25,659.95; an amount much more than sufficient to satisfy the claims of the complainants. It thus appears by the bill, that there is a fund in court, raised out of the property of the mortgagors, by a decree of this court, for the very purpose of paying, with other debts of the company, those due to these complainants. Why, then, should the complainants have the relief they now ask? Why should the court grant them aid, to enforce their liens against property in the hands of the grantees of this company, when sufficient money has already been raised to satisfy the complainants' debt. There is no account given in the bill, as to the disposition of the balance of the fund. The bill alleges, that the court decreed the priority of the Hargous mortgage, and the bank mortgage and judgment, and ordered them paid, and that they were accordingly satisfied by the receivers. Why the complainants were not paid out of the fund does not appear. If the bill be true, they are entitled to payment, and the fund is on hand for the purpose.

It may be, that the fund has been otherwise distributed. But in deciding the cause, as it is before me on a general demurrer to the bill, I must take the case as the complainants have made it. The facts as stated, are to be considered as true, and no extrinsic circumstances of explanation can be considered, either on behalf of the complainants or defendants. In this view, the complainants themselves show, that it would be inequitable to permit them to enforce their claims against other lands, when sufficient land of the mortgagors have already been sold, under a decree of this court, to satisfy their mortgages.

But there are other difficulties apparent by the bill, to prevent the complainants' obtaining the relief they seek.

All the mortgages in question cover the seventeen acre tract, in the county of Burlington. Subsequent to the execution of these mortgages, the New England Manufacturing Company, by several mesne conveyances under the Falls

Company, became seized of a small portion of this tract, Xenophon J. Maynard of another small portion, and John Sheppard of another. The fund in the hands of the receivers, was made out of that portion of the seventeen acres not conveyed to these grantees, and out of other real estate of the company in Burlington and Hunterdon counties, covered by the bank's and complainants' mortgages, but not covered by the Hargous mortgage. This fund having been raised in part out of property which the complainants' mortgage did embrace, and the Hargous mortgage did not, the complainants insist, an equity attaches in their favor to enforce the Hargous mortgage against the land held by "The New England Manufacturing Company," Sheppard and Maynard.

It is true the principle is, as the complainants insist, that where two creditors having liens, the one on two funds of a debtor, and the other on one of them only, the creditor having the lien on the two, will, in equity, not be permitted to invade the common fund until he has exhausted the other. It is the application of this principle that the complainants seek, by their bill, to enforce; and unless it can, in some way, be made applicable to the case, this suit cannot be maintained.

How is it applicable, as between the complainants and the Hargous mortgage? The complainants insist, the Hargous mortgage was paid out of a fund which belonged to them, and which was the proceeds of land in the county of Hunterdon. But how does this appear? The Hargous mortgage had the first lien on the fund which was realized from the sale of that part of the seventeen acres sold by the receivers. There is no allegation in the bill, that the portion of the seventeen acres so sold, did not bring enough to pay off this mortgage. If it did, then the money taken out of the common fund to pay this mortgage, will, in equity, be taken as that portion of the fund realized from the seventeen acres. To obviate this difficulty, the complainants amended their bill. But the amended bill is as deficient, in this particular, as the original bill. By their

amendment, the complainants allege, "that the residue of the land belonging to the said 'The Trenton Delaware Falls Company,' in the county of Burlington, after the sale and release of the said lots so sold to the said David S. Brown, William R. Hansen and John C. Benson, and Xenophon J. Maynard, &c., were not sufficient to pay and satisfy the said mortgage to the said Peter A. Hargous and the said two mortgages to the said 'The Trenton Banking Company,' with the interest due thereon at the time of the sale, and release of the said lots respectively." But the question is not, whether, at the time of the sale and release of those respective lots by "The Trenton Delaware Falls Company," the residue of the company's land in the county of Burlington, were of sufficient value to satisfy the Hargous and bank mortgages; but, was the portion of the seventeen acres sold by the receivers, of sufficient value, or did they raise out of it enough to pay the Hargous mortgage? Unless the complainants show the negative of this inquiry on the face of their bill, they have no equity.

As to the equities existing between the bank mortgages and the mortgages of the complainants. These mortgages all covered the same property. The bank mortgages were entitled to priority of payment, out of the funds in the receivers hands. They have been paid, without resorting to the lands conveyed to "The New England Manufacturing Company," Maynard and Stryker. The complainants ask that they may enforce the bank's mortgages for their benefit against the lands held by these grantees, or that their equities may, in some way, be established, upon the ground, that as between the bank mortgages and their own, the former should have been first satisfied out of these lands. But why? All the complainants now ask is, that they may have the benefit of these lands, to satisfy their mortgages. Why is "The Trenton Banking Company" brought into court for that purpose? The complainants' mortgages cover this land, as well as the bank mortgages; and if the land is liable at all for the complainants' debts, it must be appropriated for the purpose, by enforcing their own mortgages. It is no

ground of complaint against the bank, that it has left a fund untouched, upon which the complainants, as well as they, had liens in common. This was to the complainants' benefit. By their original bill, the complainants placed themselves upon this equity; they alleged, that their mortgages were not liens on the land in the hands of the grantees of the Falls Company, because the mortgages had not been recorded in the county of Burlington, where the lands were located. With regard to their mortgages, therefore, they insisted, that, with the bank mortgages, they were liens upon the fund in the hands of the receivers, a fund common to both as creditors; but that in addition, the bank mortgages were liens upon the lands held by the grantees before named, and, in equity, these lands ought to have been appropriated to pay the bank mortgages before the common fund was resorted to. But by their amendment to the original bill, the complainants allege, that the grantees of "The Trenton Delaware Falls Company," had notice, both actual and constructive, of the complainants' mortgages. How, then, can the complainants claim the equitable interference of this court for their relief, upon the ground, that their mortgages were not liens upon the land in question?

I am aware, that all these amendments were made upon the suggestion of the late Chancellor, after he had sustained a general demurrer to the original bill. But these matters are now submitted to my decision, and I must dispose of them according to my best judgment. I do not dissent from the opinion of the late Chancellor, that the original bill was deficient for want of equity. But I do not think any amendments could help it.

The demurrer must be sustained, and the bill dismissed with costs.

GEORGE D. SMALL v. ELIAS E. BOUDINOT.
ELIAS E. BOUDINOT v. GEORGE D. SMALL.

A party who seeks redress on the ground of fraud, must point out, and specify the fraud. A general charge of fraud is not sufficient.

That the complainant has understood that a sale was conducted fraudulently; that the defendants and others specified were the the wrong-doers, and that they suppressed certain facts which ought to have been made known, is not a sufficient statement of the facts which constitute the alleged fraud. It should appear in what respect the sale was fraudulently conducted, or what facts were suppressed to the detriment of the complainant.

S. being the owner of a valuable tract of land, entered into an agreement with a number of individuals to sell them the land. By the agreement the purchase was made up into shares of one thousand dollars each—B. was the owner of one share, and S. of five. The terms were that a certain per cent. was to be paid down, the property was then to be sold under the management and control of the majority of the shareholders, and S. was to be paid the balance of his purchase money out of the proceeds of the sale. It was sold in building lots, and B. became the purchaser of a lot of five thousand dollars; he paid one thousand five hundred dollars of the purchase money, and for the balance gave a bond and mortgage. On a bill filed by B. alleging that the sale was fraudulent, because there were under-bidders for the said property, in opposition to the complainant B., and in behalf of S. to inflate the price of the property. It was held that as the complainant was one of the owners of the property making the sale, as well as the defendant—that there could have been no under-bidding without the authority of the complainant himself. That the complainant should at least have alleged, and proved, that it was a secret contrivance, without his knowledge or consent.

The original bill in this cause was a bill for sale of mortgaged premises, filed by Small against Boudinot. The cross bill was filed to compel Small to take a reconveyance of the property, cancel the mortgage, and the bond it was given to secure, and account for the principal and interest money paid on the bond and mortgage. The case is fully stated in the opinion of the Chancellor.

Grover for complainant, Small.

Wm. Pennington for defendant, Boudinot.



Gifford for complainant in cross bill.

Wm. Pennington for defendant, Elias E. Boudinot. The defence raised by the answer of Mr. Boudinot, and insisted upon in the cross bill is, that the sale of the property for which he gave the mortgage sought to be foreclosed in this suit, was fraudulent and void.

1st. Because there was under-bidding at the sale among the parties interested, by which the price was inflated. Thus while Mr. Boudinot was acting under the impression of a fair and open sale, the company, and Mr. Small among them, were secretly plotting against him, placing it beyond the power of any purchaser to obtain the property for less than a fixed and exorbitant price.

I refer to the answer of George D. Small, the present complainant for the facts in the suit in chancery, against John J. Plume, which accompany the papers, and which it is agreed, with the depositions in that case, shall be read in this cause. Indeed, the answer of Mr. Small might legally be read, I suppose, as an admission on his part in writing of the transaction. The whole answer, though put in the most favorable aspect for his side, still discloses the important fact of under-bidding, and want of fairness in the public sale.

A sale made under these circumstances is fraudulent. *Howard v. Castle*, 6 *Tenn. Rep.* 642; *Baxwell v. Christie*, *Cowper* 395: *Bramley v. Alt*, 6 *Vesey Jr.*, 622, *and in note*: 1 *Story's Commentaries on Eq.*, where all the cases are cited in the note page 297, § 293.

2d. The price bid for the property under this state of things was exorbitant, being more than three times its value. 4 *Dess.* 697.

3d. By the articles of vendue the buildings were to be removed. The term are positive.

The buildings on this property were an eye-sore, and subscribers to the property were no doubt obtained for the very purpose of getting them removed. I notice a subscription

for the purchase of the property, in the name of Stephen Van Cortlandt for two thousand dollars. This was no doubt to aid in getting clear of the buildings. This gentleman lived in a retired way, with a fortune, and it was an object to get a building out of the way, used for all kinds of public shows and military companies, (for it was and well called Cadet's Hall.)

But it is said this clause in the articles did not extend to a purchaser of the lot on which the buildings were situated. He might let them remain if he pleased. This was not the spirit or object of the condition, as we presume. The other lots were not as valuable with adjoining ones covered with old buildings, as if new ones were to be erected. Indeed, it is doubtful whether the sales could have been made at all if these buildings had remained. It makes a wide difference with purchasers.

The fact of the building remaining to-day, is admitted in Small's answer. He places himself on his right to retain the building.

Mr. Small is the owner of the property; the title came from him; can he at any rate retain the possession of the property, keep his buildings on the lot, and yet demand of Mr. Boudinot interest on his purchase from the day of sale? He should, before enforcing payment of his bond and mortgage, we respectfully insist, deliver possession of the lot purchased by Mr. Boudinot, freed of the old building, according to the terms of sale.

But it may be insisted that all this might have constituted a sound objection to Mr. Boudinot's taking his deed, but having done so and given his mortgage, the contract is executed, and it is now too late to raise these objections.

I answer, that before a decree for sale can be ordered, a sum of money must be found due the complainant, upon a binding contract, and if the contract and sale be fraudulent and void, the whole must fall to the ground. Mr. Boudinot will consent that all the papers be cancelled, which is all the complainant should, in conscience, ask.

There is a very great difference between this and the case of *Small v. Plume.* That was a purchase made by Plume at the *second* sale, and not at the first, at which the under-bidding took place, admitted by Small in his answer. The Chancellor expressly grounds his decision on that distinction.

The ground was also taken by Small's counsel, that in Plume's case, under the articles of second sale, the building (in the singular) standing on the lot purchased by him, should be removed—whereas in the case of Boudinot at the first sale, it was admitted, and is unqualifiedly so expressed as a substantial part of the contract, that *all* the ***buildings*** should be removed.

Public morals require this practice of under-bidding frowned upon by the courts both of law and equity, especially the latter.

The sale was made at the time of the great monomania which pervaded the country, and which contracts have, to a great extent, been held invalid, even without special circumstances of fraud by parties themselves, and sometimes by the courts upon slight circumstances.

The case is a very hard one, and I trust the Chancellor will see good ground for annulling the entire contract, and if not, that he will refuse to allow interest until the possession of the lot cleared of the old buildings is proved to have been made.

A. Gifford for complainant in cross bill.

Under-bidding.

(*Bramley v. Alt*, 3 *Vesey* 626; *note.*) This note refers to the case of *Walker v. Nightingale*, 3 *Bro. P. C.*, 263.

Persons bidding for the vendor attend for no other purpose but to mislead the judgment and raise the price upon the buyer, beyond what any other person who really wants the thing, will give.

A purchaser judges of the value by his own judgment and



the information of others. If he sees ten persons to be supposed not connected, bidding as if for themselves, the fact conveyed to his mind is that there are ten persons who think the property of that value. Great competition is evidence that it may be of much greater value than he thought. Suppose he sees several persons bidding for a house, that will influence his judgment. An auction is upon a different principle from a private sale. In the former, the vendor renounces the right of fixing the price, and agrees to sell at such price as a competition shall raise it to.

Inadequacy of Price.

(1 *Madd.* 424–5.)

The effect of inadequacy of price upon contracts is such that where a sale has been made for a very low price, or extremely unreasonable, the court will not enforce a specific performance.

(*Seymour v. Delaney*, 6 *Johns. Ch. Rep.* 222.)

An agreement must be fair and just in all its parts, otherwise a specific performance will not be decreed. Inadequacy of price, though not so great as to amount to a fraud, may be a sufficient ground for refusing to decree a specific performance of a contract; and though mere inadequacy of price, *without other circumstances*, may not be sufficient to set aside the transaction, yet it may be sufficient to induce the court to withhold its discretionary power to enforce the performance of the contract for the sale of land.

(*Rodman v. Zilley et al.*, *Saxton's Rep.* 324.)

Courts of equity seldom interfere to set aside sales and contracts on the ground of inadequacy of price—they leave the parties to their legal remedies. *But* when they are called on for extraordinary aid to enforce a contract, they take the liberty to examine into the consideration to be given—its *fairness* and *equality*, and all the circumstances connected with it. And if any thing manifestly inequitable appears in that part of the transaction they never will lend their power to carry the contract into execution, and refers to the case of *Seymour v. Delaney, in* 6 *Johns.* 222, above.

(*Cirtheral v. Ogilvie*, 1 *Dess.* 258, *and* (*d.*) *note, and opinion of Court*, 263.)

The court in this case refused to decree the specific performance of a contract for the sale of land, where the inadequacy of price was very great, though no direct fraud or imposition was shown, and the court say that (*p.* 256) though inadequacy of price may not alone be sufficient ground to set aside a contract, yet is a material ingredient and will go a great way where the property has been sold for a sum grossly inadequate to its real value, &c., and in page 263.

The court on full consideration of the case and all the circumstances attending it, and from the evidence on the part of the defendants (although there was no proof of fraud or imposition on part of the complainant), are of opinion that the sum for which the land was agreed to be sold, is grossly inadequate to its real value. That being an unreasonable contract, and a very hard bargain, it would be unreasonable and unjustifiable to decree a specific performance of the agreement.

How far equity will go in permitting parol evidence as to intentions of a party, and how far the proceedings at first sale influenced the second sale.

(*Woolman v. Hearn*, 7 *Vesey* 216–219.)

Here the plaintiff contended she had signed an agreement to pay a rent of seventy-three pounds, but that she signed it under a belief that such was the rent payable by the defendant, the real agreement being for a lease at the same rent he paid his landlord, and offers parol evidence to prove an express agreement, she was to have it on the same terms he had it, and to show that nothing could be meant by that expression but *the same rent.*

The court say that by the rule of LAW, independent of the statute of frauds, parol evidence cannot be received to contradict a written agreement. BUT, when equity is called on to exercise its peculiar jurisdiction, by decreeing a specific performance, the party to be charged is let in to show *that*

under the circumstances the plaintiff is not entitled to have the agreement specifically performed, and that there are many cases where parol evidence of such circumstances has been admitted, as in the case of *Baxter v. Lester*, when upon the face of the judgment, a specific sum was to be given for timber; but it was shown by parol that the defendants *were induced* to give that upon the representation that it was valued by two timber merchants, which was not true.

(*Clark v. Grant*, 14 *Vesey* 519.)

Here specific performance of an agreement in writing, for a lease for sixty years, was refused upon parol evidence of an alteration stipulated for at the time, and upon the faith of which the party assented, the defendant had signed the agreement upon faith of a certain *alteration in the premises being made*, and the court say that it would be against equity, and a fraud on the defendant, to insist upon his performance of an agreement which he only signed on the faith of an alteration being made in one of its terms. It has been ruled that it is not open to a plaintiff to supply or correct a term of a written agreement by parol, but it has never been determined that a defendant cannot set up a parol engagement in opposition to a party, who, having entered into it, *seeks to have a written agreement performed independently of it*, and they decree that the bill shall be dismissed, unless the plaintiff shall execute such a lease as the defendant promised he was to have.

In the case of Boudinot, it was not only made a condition of sale (in the written articles of purchase), that the buildings should be removed; but it was proved that so it was given out at the time of sale expressly.

Concealment of intentions to keep the buildings on the premises.

(*Shirley v. Stratton*, 1 *Bro. c. c.*, 440.)

This was a bill for the specific performance of an agreement for the purchase of an estate in Marshland at *Banking*, in Essex, and for the payment of a sum of one thousand

pounds, the purchase money, the defence was that the estate was represented to defendant as clearing a neat value of ninety pounds per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an outlay of fifty pounds per annum—and it appearing upon evidence there has been an industrious concealment of the circumstance of the wall during the treaty. Bill dismissed with costs.

(*Meade v. Webb*, 1 *Bro. P. C.*, 308.)

In treaties for an agreement, a wilful and industrious concealment of a material fact by one of the parties, in order to keep the other in ignorance, is a gross fraud, and will in equity, set aside the contract.

As to fraud not charged in the bill, but replied to fully in the answer.

(*Cooper's Equity Pleadings, p.* 314, 1 *Vesey Sen.* 535.)

A defendant is not obliged to answer facts without being stated or charged in the bill, but if defendant does answer to such facts, and plaintiff replies to such answers, they are properly put in issue, though they were not charged in the bill.

How far a general charge in a bill permits particular evidence as to circumstances.

(*Faulder v. Stuart*, 11 *Vesey*, 301.)

Question whether there is such a charge in the bill, as to the payment of the consideration of an assignment, as entitles plaintiff to an answer as to all the circumstances. I have always understood that a general charge enabled you to put all questions upon it that are material to make out whether it was paid.

(*Small v. Boudinot.*)

The points raised on the argument in this case have greater force, when it is considered that the great object of the sale, which appears by the pleadings and evidence in both the cases of Plume and of Boudinot, that the object of the purchasers was not speculation, (as will be seen by the

result of the sale, by scarcely one hundred dollars)—or any immediate profit; but was to deliver the town and neighborhood from acts and scenes of a demoralizing tendency, and to build up with substantial buildings on the site of those which were dilapidated and unsightly. Purchasers were induced to bid, under the positive assurances that the buildings should certainly be removed—a positive condition which must stand as a subsisting ground of specific performance as in the case of *Clarke v. Grant*, 14 *Vesey* 524. "It would be," says the master of the rolls, "against equity and a fraud on the defendant, to insist upon his performance of an agreement which he only signed on the faith of an alteration being made in one of its terms—but for this promise *there would probably never have been any agreement at all.*"

The question is—can Boudinot be made to comply with a contract, the most important terms of which never have been, in the least degree, attempted to be performed by the vendor—and when fraud, deceit and the grossest advantage have been taken?

THE CHANCELLOR. The original bill was filed by Small against Boudinot, on a mortgage given by Boudinot and wife to Small, to secure, in part, the purchase money for the land embraced in the mortgage. Boudinot, by his answer, sets up fraud in the sale, and further, that the conditions of the sale have not been complied with.

The object of the cross bill is to compel Small to take a reconveyance of the property, cancel the mortgage, and the bond it was given to secure, and account for the principal and interest money paid on the bond and mortgage.

Small was the owner of a valuable tract of land in the city of Newark. In 1836, he entered into a written agreement with a number of individuals to sell them the land. By the agreement, the purchase was made up into shares of one thousand dollars each. Boudinot was the owner of one share, and Small of five shares. The terms were, that a certain per cent. was to be paid down—the property was then to be sold under the management and control of the



majority of the shareholders, and Small was to be paid the balance of his purchase money out of the proceeds of the sale. It was sold off in building lots at public sale, and Boudinot became the purchaser of a lot at five thousand dollars. He paid one thousand five hundred dollars of the purchase money, and for the balance gave the bond and mortgage in question, upon which several years interest has been paid.

The bill alleges, the sale was fraudulent.

First. That "there were under-bidders for the said property, and that such under-bidding upon the same, in opposition to the complainant, was in behalf, or at the instance of the said George D. Small, to inflate the price of the property; and the price at which the same was struck off was far beyond what the said property would bring, and beyond what any other person would have been willing at that, or other time, before or since, to give for the same."

There were twenty-eight owners of the property. The sale was made by them; and of which number the complainant in the cross bill was one, as well as the defendant. How then, there could have been under-bidding at the sale in opposition to the complainant, and on behalf, or at the instance of the defendant, cannot well be conceived. If there were any bids in opposition to the complainant, in behalf of the defendant, they were not under-bids, but *bona fide* bids, by which the defendant was bound. What authority had Small to under-bid? He could not do it without the authority of the vendors. It is not alleged, that they gave him any authority. If they did, as the complainant was one of the vendors himself, he ought to go further, and, at least, allege and prove, that it was a secret contrivance without his knowledge or consent.

Again. The complainant alleges, that he continued to pay interest on his bond, until *he was informed* "that the said sale was the result of contrivance and management between Small and some of the committee, secretly, and designedly, to deceive and defraud the purchasing (purchasers) at said sale."

But what the contrivance between Small and some of the

committee was, and how the said sale was the result of such contrivance, is not stated, but left to conjecture. The complainant had before alleged, that the under-bidding was at the instance, and on behalf of Small. This has no connection with the charge of contrivance between Small and the committee.

There is one other allegation of fraud in the bill. I will state it in the language of the bill: "That he has understood, since the payment of the said interest and notes, that the said sale was promoted and set forward, and was carried on by means of a secret understanding between the said George D. Small, and some person or persons on the committee appointed to conduct the sale as aforesaid; and in a fraudulent manner, for the purpose of deceiving your orator, Elias E. Boudinot, and that there were such proceedings had on the part of the said persons composing the said committee, or some of them, upon arrangement made with the said George D. Small, as were suppressive of such facts as ought to have been known to the bidders, and such as were fraudulent, to deceive the said purchasers, and especially your orator, and that there was in the inception of the said agreement for purchasing as aforesaid, and conduct of the said sale, fraud, misrepresentation and concealment, on the part of the said George D. Small, by means of which the said purchase was made by your orator, Elias E. Boudinot, and with a design to sell off the said lots, and particularly the lot sold to your orator, at a price inflated, and far beyond its value."

It is apparent, that a charge like this is no foundation for relief. A party who seeks redress, on the ground of fraud, must point out, and specify the fraud. A general charge of fraud is not sufficient. The party alleging it, must state the facts which constitute the fraud. A general charge of fraud in a bill, is not sufficient to authorize a decree for the complainant, on demurrer to the bill. *McCaleb v. Perry*, 5 *Heyward*, 88. How can the defendant meet this charge? How can he answer it? The charge is only this: That the complainant has understood (without even averring his be-



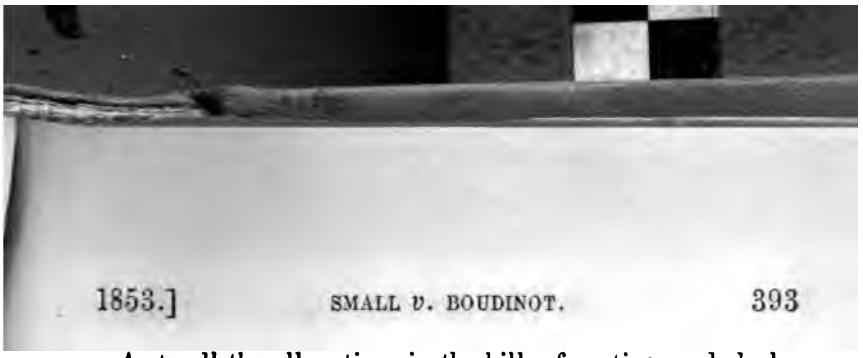
lief of its truth), that the sale was conducted fraudulently—that the committee and Small were the wrong-doers—and that they suppressed certain facts which ought to have been made known. In what respects the sale was fraudulently conducted, or what facts were suppressed, to the detriment of the complainant, we are not told.

The fraud is denied in the answer, without any reserve; and I do not think there is the least evidence, to suspect even, that any fraud upon the complainant was contemplated or practised, either by Small or the committee, or by any one else. All the evidence upon which the complainant's counsel rely is, that, at the sale, two lots were purchased in on behalf of the vendors. But how can this affect the purchase of the complainant? Suppose the other lots were fraudulently sold, and that, by the contrivance of the defendant, the price was run up, and became exorbitant; unless the complainant can show that the persons who were *his* competitors at the sale for the very lot he purchased, were fictitious bidders, and that he was defrauded, the fact that there were under-bidders for other lots, and fraud in the sale, can avail the complainant nothing. Now, it is not shown that there were any bidders against the complainant. From everything that appears in the case, the complainant obtained the lot at his own price. The complainant does not show himself entitled, either to the morality or the law, laid down by Lord Mansfield in *Baxwell v. Christie. Cowper* 395. There is no fault in the counsel who drafted this bill—the facts are wanted upon which a bill can stand.

As to the relief asked for, on the ground that the conditions of sale have not been complied with. The third condition was as follows:

3. The buildings will be sold, to be removed within thirty days from this date, from the premises.

The buildings were sold separate from, and after the sale of the lots. Small bought a lot upon which was a building and afterwards purchased the building. He has not removed it, and the complainant insists he has a right to have the contract rescinded, and the parties placed in *statu quo.*



As to all the allegations in the bill, of motives and declarations of the vendors in prescribing this condition of the sale, they cannot be considered. The condition is reduced to writing, and the motives of the parties, or their subsequent parol declarations, cannot give construction to it. Besides, no attempt was made to prove the allegations, and as far as the character of the charges would admit of a denial by him, they are denied by the answer of the defendant.

This condition of sale was a matter between the vendors and the purchasers of the buildings. It was not a condition upon which the lots were sold. The purchaser of a building took it upon the condition, that he would remove it in thirty days. Of what benefit is this condition of sale to a purchaser of a lot without a building? If it is a farm house; if the condition requires its removal, it does not prevent another of like character being erected on the same lot. If the object to be accomplished, and which was in view of the parties interested, was to rid the lots of a certain description of buildings—this condition did not accomplish it. The purchasers were in no wise restrained, as to the character, or description of buildings to be erected, nor were they prohibited from retaining buildings already there.

It is not necessary to examine the other demands upon which the relief sought for by the cross-bill is resisted.

The cross-bill must be dismissed with costs. The complainant in the original bill is entitled to his decree, with a reference to a master to compute the amount due on his mortgage.



CASES

ADJUDGED IN

THE COURT OF CHANCERY

OF THE STATE OF NEW JERSEY,

OCTOBER TERM, 1853.

JOHN BALDWIN *v.* HENRY H. RICHMAN *et al.*

H., under the will of his father, became seized of an estate which, under the statute of 1784, became a fee simple in his eldest son J., who being under a misapprehension of his rights, and supposing that under the will of his grandfather, he was tenant in common with his brother and his two sisters, applied to the Orphans' Court for a division of the land. Each of the children took possession of the shares severally allotted to them: and the brother afterwards conveyed his share by deed to the complainant, having previously expended money upon it, improved and fenced it—cut off the wood and paid the taxes upon it from the time of its allotment to him until his sale of it. J. died intestate. His children, the defendants in this case, had brought an ejectment against the complainant, and were in possession under that judgment.

Held, that the complainant, under the circumstances of the case, was not entitled to an account against the defendants, for the improvements he has put upon the property, or the consideration money he had paid for the land.

That the grantor of the complainant could not in equity recover of his brother the value of the improvements he had put upon the premises, unless it appeared that the expenditures made had been induced by the conduct of J., and that that conduct was such as to make it against good conscience that he should reap an advantage from it at his brother's expense. *The mere fact of a mistake* on the part of J. could give the grantor of the complainant no equitable claim for relief.

That this could not be likened to a case where a man having title to land, stands by and encourages the sale without forbidding it. For J. was wholly ignorant of his legal rights, and they were rights of which his brother *had the same knowledge as he had.*

The maxim that where one of two innocent persons must suffer, he shall suffer, who by his own acts occasioned the confidence and loss, is not applicable, for *both acted with full knowledge of all the facts.*

That the complainant stands in a very different position from his grantor. If his grantor had an equitable claim to be paid for the improvements, he has no equity, unless he is a *bona fide purchaser without notice.*

That the bill should have been demurred to, for want of the allegation.

Henry Richman, deceased, by his last will, dated 6th January, 1779, proved 15th September, 1787, devised as follows, viz: "I give unto my son, Henry Richman, the plantation I now live on," &c. "I give it to my son Henry during his natural life, and then to the heirs of his body, lawfully begotten, forever."

Henry Richman, the devisee, entered into possession, and then by deed, 5th January, 1796, conveyed the premises so devised to him, to one Thomas Parvin.

Henry Richman (2d), died about 1825, leaving four children; Jeremiah, (the eldest son). Benjamin, Charlotte and Constantia, who upon his death brought suit to recover the premises so conveyed to Parvin. The heirs of Parvin relinquished the premises, and on the 14th of January, 1826, before the day to which the ejectment was returnable, made and executed to Jeremiah Richman (the eldest son and father of the complainants), an absolute release and quit-claim of the land so conveyed to their father, Thomas Parvin.

At September term, 1826, the said Jeremiah Richman applied to the Orphans' Court of the county of Salem, for a division of the land devised by his grandfather, Henry Richman, among the heirs-at-law of his father, Henry Richman (2d). The petition presented by him to the Orphans' Court recited that the "petitioner together with Benjamin, Constantia and Charlotte Richman, are heirs of Henry Richman, late of the county of Salem, deceased, who devised certain real estate, of the township of Pittsgrove, to the said heirs (after the decease of their father, Henry Richman, Jr.,) by his last will and testament, which they now hold undi-

vided and as tenants in common," &c. He therefore prayed the court to appoint commissioners "to assign and set off to each one of said heirs, their shares, by metes and bounds, agreeably to the will of said deceased." The court upon this petition appointed commissioners to make such partition, who divided the premises accordingly, and made their report thereof, which was confirmed at December term, 1826. The said children of Henry C. Richman took possession of the shares so severally allotted to them, and Benjamin Richman, on the 5th of January, 1836, conveyed his share, by deed, to John Baldwin, who is in possession of the same, for the sum of two hundred and fifty dollars.

Jeremiah Richman died, May, 1845, intestate, not having sold, or otherwise made any disposition of the premises devised by the will of his grandfather, leaving the complainants, his children and heirs-at-law.

These facts are undisputed.

The bill alleges, that Benjamin Richman used and occupied the land as his own, from the time of its allotment to him, until his sale of it to Baldwin; that he expended money on it, improved and fenced it; cut off the wood, and paid the taxes from year to year; all of which was done with the knowledge of Jeremiah, and without his interference. That the defendants have commenced an action of ejectment against the complainants, and have obtained judgment in their favor, and have issued a writ of *habere facias possessionem* to turn the complainant out of possession.

The prayer of the bill is, that the defendants may be perpetually barred from further proceedings at law; or, if the court should be of opinion that the defendants are entitled to recover the possession, then, that they may be decreed to come to an account with the complainant for the money expended by him on the land in improvements, and for taxes, &c., &c.

All the defendants answer the bill. They allege that the application to the Orphans' Court made by Jeremiah Richman, was under a misapprehension of his rights; and that if possession was held of the land by his brother, the

taxes paid and improvements made, it was under like misapprehension, and they deny the right of the complainants to call upon them for remuneration.

Proofs were taken on both sides.

W. Halsted for complainant.

P. D. Vroom for defendants.

THE CHANCELLOR. It is admitted that Henry Richman, under the will of his father, became seized of an estate in the land in controversy, which, under the statute of 1784, became a fee simple in his eldest son Jeremiah.

Jeremiah died intestate. His children, as his heirs-at-law, brought an ejectment to recover possession of the land. The defendant in the ejectment, who is the complainant in this suit, set up, in defence, the proceedings in the Orphans' Court, and Jeremiah's subsequent acquiescence in his brother's, and in his brother's grantee's possession, as owners, as an *estoppel*, as well against himself as those claiming under him. The Supreme Court gave judgment against the defendant in ejectment. The defendants in this suit are now in possession under that judgment.

The only question for this court now to decide is, whether the complainant, under the circumstances of the case, is entitled to an account against the defendants for the improvements he has put upon the property, and to recover their value, as well as the consideration money he paid for the land?

It is manifest, that the complainant cannot maintain his claim, except under the equities which existed between his grantor and Jeremiah Baldwin. If Benjamin Richman could not, in equity, recover of his brother Jeremiah the value of the improvements which Benjamin put upon the premises, then this complainant has no right of action for his improvements. The bill is correctly framed in this view of the complainant's rights, and this is made the foundation of this suit.

Let us see, then, what equitable claim Benjamin Richman

had against Jeremiah Richman. It must be shown that the expenditures made on the land by Benjamin, were induced by the conduct of Jeremiah, and that that conduct was such as to make it against good conscience that he should reap an advantage from it at his brother's expense.

The application of Jeremiah Richman to the Orphans' Court was made under a misapprehension of his rights. He supposed that, under the will of his grandfather, he was tenant in common with his brother and his two sisters. This is apparent from his petition to the court, in which he represents himself, his brother and two sisters, as tenants in common, under the will of their grandfather. In fact, they were all laboring under the same misapprehension; for they had previously commenced, in the name of all of them, as tenants in common, an ejectment suit against a tenant in possession, who claimed under a deed from their father.

The proceedings in the Orphans' Court conferred no title. Their consequences, upon the rights of Jeremiah, were no more than if he himself had selected three men to divide the land into four equal parts, and under such division had suffered Benjamin to take possession of one of them.

The bill charges no fraud upon Jeremiah. We can hardly conceive of any fraud he could have meditated.

Under this division, Benjamin took possession of the land, and now all the consequences that have resulted are attributed to the mistake of his brother. But we ought not to forget, that Benjamin did not claim title to this land under the proceedings of the Orphans' Court, nor under his brother, nor under any act of his. He claimed title under his grandfather's will. He took possession claiming under the will, adverse to his brother. He gave no consideration and the responsibility of the mistake rests as much upon himself, as upon any one else. In presenting this part of the case, the bill is altogether defective, in making out a case which can possibly entitle the complainant to relief. It does not allege, that Benjamin took possession of the land, and improved it, under the impression that the land was his own; nor is there any allegation that it was the

conduct of Jeremiah that induced him to take possession, and make the improvements. From any thing that appears in the bill to the contrary, he knew that Jeremiah was acting under a mistake, and took advantage of it. The mere fact of a mistake on the part of Jeremiah could give Benjamin no equitable claim for relief. It should appear that he was the victim of such mistake; and without any fault of his own, had sustained injury. The bill does not allege this in terms, nor do I think it is fairly to be inferred from its statements.

Again, the bill alleges that Jeremiah stood by and saw Benjamin make improvements on the land, and permitted him to pay the taxes. The improvements consisted in some fencing. The value of the fence, or the amount of the taxes are not stated. The answer makes no admission as to these matters, as they were not within the knowledge of the defendants; and the complainants have offered no proof in regard to them. It does, however, appear in proof, that Benjamin cut wood to the amount of eighty dollars in value. There is nothing to show that the use of the land, and the wood cut, were not more in value than the taxes paid, and the value of the fencing. Thus in the whole case, the complainant does not show any injury that calls for redress as between the two brothers. Unless Benjamin received some injury, there could be no equities to adjust as between him and his brother, and nothing to call for the interference of the court. It was insisted by counsel, that the conduct of Jeremiah in putting his brother in possession, and permitting him to make improvements, amounted to a *constructive* fraud. Admitting this to be so, Benjamin could have no claim in equity, unless he could show that he had sustained some injury from the fraud. But this could not be likened to a case, where a man having title to land, stands by and encourages the sale without forbidding it. Jeremiah was wholly ignorant of his legal rights, and they were rights of which Benjamin had the same knowledge upon what they depended that he had. Nor could the maxim be applicable, that where one of two innocent persons must suffer, he shall



suffer, who, by his own acts, occasioned the confidence and loss; because both acted with full knowledge of all the facts.

But admitting, that under the circumstances of the case, Benjamin Richman had an equitable claim to be paid for the improvements he put upon the land, the complainant stands in a very different position from Benjamin Richman.

The complainant has no equitable claim for relief, unless he is a *bona fide* purchaser without notice. If he purchased this property with notice that his grantor had no title, what claim can he set up in equity against the rightful owners, to be paid for his improvements? He must show his equity by his bill. He does not allege that he was such purchaser—the bill should have been demurred to for this defect. It is proved, that he had notice, that his grantor had no title; and that he was informed of Jeremiah Richman's title, and of the character of that title. He procured a copy of the will of Henry Richman, and had it examined. He was informed, that by the will, the title was in Jeremiah Richman. It is proved, that on account of the defect of title in his grantor, he purchased the property for about half its value; that after he purchased, he procured a strip of land from his neighbor to erect his buildings upon, and gave as a reason, that his title to the land purchased of Benjamin Richman was defective.

The counsel of the complainant insisted that this was not put in issue by the pleadings, and therefore the defendant should not be permitted to have the benefit of this testimony. But it was not necessary for the defendants to put the question in issue. The complainant should have made the issue. He has no case without it. He must recover upon the case made by his bill, and if that is not such as entitles him to relief, he cannot have a decree in his favor. To sustain the character of a *bona fide* purchaser *without notice*, the party must aver and prove, not only that he had no notice of the adversary's rights before his purchase, but that he had actually paid the purchase money before such notice. (*Ex. S. Jewett v. Palmer and May*, 7 *J. C. R.* 65.)

The bill must be dismissed with costs.



Between JOHN KEAN, complainant, and JOHN T. JOHNSON AND OTHERS, and the CENTRAL RAILROAD COMPANY, defendants.

When a board of directors or a majority of stockholders, deviate from the originally contemplated undertaking, the "rights" of other and dissenting stockholders are "affected;" as against them they cannot legally do it.

A majority of stockholders in a prosperous corporation, cannot at their own mere caprice, sell out the whole source of their emoluments and invest their capital in other enterprises, where the minority desire the prosecution of the business in which they had engaged. The contract is, that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes.

Where the duration of such employment is limited in the charter, until that time it must continue so employed, unless, perhaps, in case of clear loss. If no time is fixed by the charter, at which the proposed use of the capital shall cease, the contract is that so long as the affairs of the company are prosperous it shall go on, unless all consent to the contrary.

How far, under what circumstances, and upon what application a court of equity would restrain a corporation from an improper alienation of its property, must depend upon the general principles which guide it in the exercise of its powers; but in a proper case made, it would interefere to prevent a disposition of its property *for other than corporate purposes*.

It is the right of a partner to hold his associates to the specified purposes, whilst the partnership continues."

In the enacting section of the charter of a railroad, the words "And they and their successors by the said name and style shall be capable of purchasing, holding, and *conveying*, any lands, tenements, goods and chattles whatever, necessary and expedient to the objects of this incorporation," only authorize property to be sold and conveyed away, when it is necessary or expedient to *the objects of the incorporation*. The *objects of the incorporation* cannot require that the necessary source of its profitable existence should be sold and conveyed away.

A supplement to the act of incorporation of a railroad company, authorizing the company to purchase the road constructed by another company, and declaring that the purchased road should become a part of the road authorized to be constructed by the charter, contained a proviso: "That nothing *in this act* contained shall in any wise affect *any right whatever*, either at law or in equity, *of any stockholder*, or other person in, or any claim or demand against the company, whose road it was contemplated to purchase. *Held* that the purchase authorized by the supplement, did affect the rights of the stockholders in the company, whose road was to be purchased. And that the legislature intended, when they provided that nothing in that *act* contained, should in any wise affect *any right whatever*, that such purchase should not occur, without that which

alone could prevent its affecting such rights, viz: the consent of every stockholder.

Quere—Whether a supplement authorizing any deviation from the original charter and not requiring the consent of all the stockholders, is unconstitutional?

Where the company whose road was purchased under the above supplement, and who were not a *necessary* party to any of the different *kinds of relief prayed*, had not been made a party to a bill filed by one who was a protesting stockholder, against the directors of both roads, and the company in possession of the road, and all its property but the franchise; and the objection was not taken until the hearing of a general demurrer to the equity of the bill. The court disposed of the case on its merits, without requiring such formal parties to be joined.

John Kean files his bill in this court against John T. Johnston and others, individuals, and the Somerville & Easton Railroad Company, otherwise called the Central Railroad Company of New Jersey, of which they are directors, praying an injunction and other relief; to which bill the defendants have filed a general demurrer.

The bill states, that under an act of the legislature, passed February 9, 1831, a corporation was organized, called the Elizabethtown & Somerville Railroad Company, which soon after went into full operation; that in 1839–40, being in want of funds, to pay for the making of the road, the company borrowed large sums of money, for which they mortgaged not only its property, but its franchises or chartered rights; which mortgages by a supplemental act were validated by the legislature and consent of two-thirds of the stockholders, which consent was by said act required; that afterwards these mortgages were foreclosed, a sale had, and a deed conveying all the property and chartered rights of said company, duly made to Stearns & Colket, purchasers at the mortgage sale; that these purchasers divided the ownership and propriety of their purchase into eight thousand shares of capital stock, one thousand five hundred shares of which the complainant bought, and part of which he still holds; that under this creation of new stock a new company was organized, a new rail laid over the road, and the business of transporting freight and passengers was begun and carried on with renovated and much increased power and success.

The bill further states, that in 1847, another company was chartered by the legislature, to construct a railroad from Somerville to Easton, and called the Somerville & Easton Railroad Company, in which the individual defendants named in the bill (with two exceptions) owned a large majority of the capital stock, and have always been the directors; that about the latter part of 1848 they combined together for the purpose of amalgamating the two companies under a different organization, and of compelling the other stockholders of the Elizabethtown & Somerville Railroad Company to surrender their stock; and procured the passage of a supplement to the act to incorporate the Somerville & Easton Railroad Company, which is set forth at length in the bill.

The act provides as follows:

1. That it shall be lawful for the Somerville & Easton Railroad Company to purchase the *road* constructed by the Elizabethtown & Somerville Company.

2. That if payment of said purchase can be made in stock, the Somerville & Easton Railroad Company can issue so much as shall be required for that purpose.

3. That the purchased road shall be and become a part of the road authorized to be constructed by the Somerville & Easton Company, and regulated by its charter, and that that company shall thereafter be known as the Central Railroad Company of New Jersey.

Provided, That nothing in this act contained shall in anywise affect any right whatever, either at law or in equity, of any stockholder or other person in, or any claim or demand against the Elizabethtown & Somerville Railroad Company, or any lien whatever upon said railroad or upon any property which by virtue of this act shall be transferred or conveyed: *And provided further*, That upon such purchase as aforesaid being completed, the said The Central Railroad Company of New Jersey shall thereby become responsible for all debts contracted by the Elizabethtown & Somerville Railroad Company, since the foreclosure of the mortgage or mortgages under which the present stockholders of said last

named company claim to hold the said railroad, and shall be liable therefor in law and equity, in like manner as if the said debts had been contracted by the Somerville & Easton Railroad Company: *Provided also*, That the said purchase shall be made with the consent of the last mentioned stockholders.

The bill then further avers that, after the passage of this act, and about April 1, 1849, the individual defendants in the bill, holding a large majority of the stock of both companies, and being directors of each, and constituting almost the entire boards, did proceed, using and proceeding in the names of said companies respectively, and assuming to act as said companies, to continue and carry out a bargain and agreement between the said two companies for the sale of the railroad and other property and appendages of the Elizabethtown & Somerville Railroad Company, and procured of Stearns & Colket, the purchasers at the master's sale, a deed conveying to the latter company, all the property and appurtenances of said road as the same were conveyed by the master to them.

The two roads thus united, the name was changed to "The Central Railroad Company of New Jersey," and under that name the corporation has since carried on operations over the road and with the property of the Elizabethtown & Somerville Railroad Company.

The complainant further avers that he was and is owner of two hundred and seventy-five shares of stock in the Elizabethtown & Somerville Railroad Company, as issued anew by Stearns & Colket; that Thomas A. Hartwell and William Thompson also were and are owners of a large number of said shares, but that they neither of them gave any consent to this proceeding, but protested against the sale of their road, and still continue to protest against and resist it.

For this reason, the complainant insists that the purchase and sale made was not valid, and that all subsequent proceedings of said Central Railroad Company, in taking possession of said Elizabethtown & Somerville Railroad,



with its appendages and appurtenances, and in exercising control and dominion over them, are altogether fraudulent against the complainant and the other dissenting stockholders, and void.

Complainant then avers the existence of a large and profitable business on the road between Somerville and Elizabethtown, from the year 1846, and that a considerable surplus had been gathered at the time of the sale complained of; and that the new corporation has mortgaged all its property heavily, (to the amount of one million, five hundred thousand dollars), to raise money for the purpose of extending the road to Easton—an additional fraud, in the view of complainant, upon all stockholders not consenting to the sale of the Elizabethtown road.

The bill then prays—

That the defendants, viz: The directors, individually, of the two roads, the mortgage trustees, and the corporation, by whatever name rightly called, may discover and disclose the full amount of the earnings of said Elizabethtown road, from the commencement of its operations under the Stearns & Colket purchase, to the present time.

That defendants may account for these earnings. That the purchase complained of, and the bonds and mortgages may be declared void, and of no validity whatever, and for an injunction against any further issue of any bonds or mortgages upon said road by the Central Road Company.

The Chancellor having been concerned as counsel for defendants, the matter was referred to Cortlandt Parker, Esq., one of the masters of the court before whom it was argued.

J. P. Bradley and *W. L. Dayton* for complainants.

Frelinghuysen and *Zabriskie* for defendants.

THE MASTER. The questions raised by the demurrer in this cause are two-fold—

I. What is the proper construction and meaning of the proviso to section three, of the act recited in the bill passed February 22, 1849? Does that proviso require the consent

of *all* the stockholders of the Elizabethtown & Somerville Railroad Company before the purchase of the road by the Somerville & Easton Road becomes valid? or only the consent of a majority of said stockholders?

II. If the proviso does require the consent of all such stockholders to constitute a valid transfer of the road, can the remedy sought be given in the present suit?

Notwithstanding the extremely able and ingenious arguments of the counsel for the demurrants, it seems to the master that the plain language of the statute in question, requires the consent of all the stockholders of the Elizabethtown & Somerville Railroad Company, before the road in which they as stockholders have a joint ownership, under the purchase by them, and the acts of the legislature in reference thereto, can be sold and conveyed away from them.

The act, by its first section, empowers the Somerville & Easton Company to buy the other road. The second section empowers the purchase, if the terms can be arranged, to pay the purchase money in their own stock, and to issue sufficient therefor. The third section makes the road, when so purchased, part of the road authorized to be constructed by the Somerville & Easton Company, and extends the charter of the latter over it. It also changes the name of the consolidated company, on completion of the purchase, to that of the Central Railroad of New Jersey, and directs that all suits pending against the Somerville and Easton Company shall proceed to judgment against the Central Railroad of New Jersey; and then comes the proviso which is the subject of dispute, and which has already been at length recited.

The language of this proviso is very general and comprehensive. "Nothing *in this act* contained," is its first branch "shall in anywise affect *any right whatever*, either at law or equity, of *any stockholder* or other person in, or any claim demand against the Elizabethtown and Somerville Railroad Company, or any lien whatever upon the said railroad upon any property which by virtue of this act shall be transferred or conveyed." Again, says the proviso in its sec-

branch, "upon such purchase as aforesaid being completed, the Central Railroad of New Jersey shall thereby become responsible for all debts contracted by the Elizabethtown and Somerville Railroad Company since the foreclosure of the mortgages under which its *present* stockholders claim to hold the said road. And lastly, this branch provides, the "said purchase shall be made with the consent of the last mentioned stockholders."

What rights, then, had the stockholders of the Elizabethtown and Somerville Company at law or in equity *in* that corporation? Does a sale of the road, which was the source of all their emolument, actual or prospective, whose possession was the very condition of their actual, if not technical being, and the diversion of their capital to other employment, affect in anywise their rights. If so, by the clear meaning, almost the express words of the proviso, they had a right to dissent, and that dissent prevented the transfer permitted by the act, at any rate so far as regarded *them*. If a transfer, it did not affect the rights of the dissentient, whatever other effect it might have. I cannot divert my mind from the conclusion that a sale of their road, and the employment of the capital they invested in it, to other uses, does affect the right of every stockholder in a Railroad Company. As stockholders, they own the road in common, to be employed in specified uses. Each owns a share in the whole, and is to have a proportionate share in its profits. They have invested a portion of their capital in it, and in it alone. They have a right in the road, and in every dollar it earns. The directors are their trustees, to employ the joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen they may reap the contemplated profits. And this is the agreement of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine *within the scope* of this mutual contract, they each agree to abide by, but there their mutual contract ends, and no majority, however large, has a right to divert one cent of the joint capital to any purpose not con-

sistent with, and growing out of this original fundamental joint intention.

To sell the road, to abandon the contemplated investment and embark in another scheme, whether entirely different, or only more extensive than the original contemplation as apparent on the face of the charter, is, it seems to me, clearly contrary to the rights of the individual stockholders. If they had any right as partners or beneficiaries, it would seem to be this, that their money should be devoted to that use, and never employed in any other, nor returned to them before they desire it. The mere statement of the proposition seemed to me to prove it. No argument, however lengthened, can add to the force of the naked position.

The general principle here asserted has frequently received the sanction of the courts both of England and this country. It is the same, whether applied in the case of private associations or incorporations. "It is not, I apprehend," says Lord Eldon, "competent to any number of persons in a partnership, (unless they show a contract rendering it competent to them,) formed for specified purposes, if they propose to form a partnership for different purposes, to effect that formation by calling upon some of the partners to receive the subscribed capital and interest and quit the concern." "And again," he says in the same case, "those who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce." *Natusch v. Irving*, *Appendix to Gow on Part.* 576, *Am. Ed.* 1830. And see also the opinion of Kent, C., in *Livingston v. Lynch*, 4 *Johns. Ch. R.* 573. So in incorporations. Nothing is more certainly settled than that any fundamental alteration of a charter, or material deviation from, or extension of a road, in the case of road companies, interferes with the rights of the corporators, and that no majority, however large, can compel any individual stockholders to submit. Thus, in such cases, if the stockholder has not paid his subscription, he is freed by such deviation from liability on his contract to do so. *New Haven and Connecticut Railroad Company v. Croswell*,

Hill, 383; *Union Lock and Canal Company v. Towne*, *N. H. Rep.* 44; *Middx. T. Corp. v. Locke*, 8 *Mass. Rep.*, 268; *Same v. Swan*, 10 *Mass. R.*, 385. The opinions of the able Judges who decided these cases, present the principle with remarkable clearness and force. The late distinguished Judge Woodbury, in *Union Lock v. Towne*, states the ground of his judgment thus: "Every individual owner of shares, whether a petitioner or associate or purchaser, expects, and indeed stipulates with the other body owners, as a corporator, to pay them his proportion of the expense which a majority may please to incur *in the promotion of the particular objects of the corporation.* By acquiring an interest in the corporation therefore, he enters into an obligation with it in the nature of a special contract, the terms of which contract are limited by the specific provisions, rights and liabilities detailed in the act of incorporation. To make a valid change in this private contract, as in every other, the assent of both parties is indispensable. The corporation on the one part can assent by a vote of the majority; the individual on the other, by his own personal act. However, the corporation then may be bound by the assent to the additional acts, the defendant in his individual capacity, having never assented to either of them, is under no obligation to the plaintiff, except what he had incurred by becoming a member under the first act. *Consequently, the assessment sued for, if raised to advance objects essentially different from those originally contemplated, are not made in conformity to the defendant's special contract with the corporation.*"

It has been said that these cases do not decide the present, because they were actions brought to recover the amount of assessments or subscriptions against parties who had not paid them, and disputed their liability. But they are cited as authority, and are authority of great weight in favor of the principle, that when a Board of Directors or a majority of stockholders, deviate from the originally contemplated undertaking, the "rights" of other and dissenting stockholders are "affected," as against them they cannot legally

do it. Each of them may truly say "*non hæc in fœdera veni.*" It is to this end only, that they are at present adduced. They could never have been decided thus, if the courts had not been of opinion that the rights of stockholders *were* affected by any use of their invested money in a different way from that which in the beginning they intended and expected.

But the cases already cited are not the only decisions upon the point under examination. In *Natusch v. Irving*, decided by Lord Eldon, whose opinion therein has been already referred to, an injunction was granted on the application of an individual member of a company organized for the purpose of carrying on a fire and life insurance business, restraining the company from also embarking, as they intended, in marine insurance. And that was a case of great apparent hardship since the complainant was alone, and had only paid one hundred and fifty pounds to the funds, the whole capital being five hundred thousand pounds, divided among more than six hundred stockholders. In *Livingston v. Lynch*, 4 *Johns. Ch. Reports*, 573, where a certain method of doing the business of the company was defined by the fundamental articles, and the officers, or some of them, had assumed powers not conferred upon them by these articles, though authorized by subsequent resolutions of the stockholders, Chancellor Kent, in an elaborate opinion, discusses this subject of the rights of the individual stockholders, and granted the injunction prayed for against the objectionable conduct of the officers as a material deviation from the fundamental agreement under which the stockholders had associated. In *Ware v. the Grand Junction Water Company*, 2 *Russ. & Mylne*, 461, Lord Brougham, on the application of a single shareholder, restrained the corporation from embarking their funds and credit in getting water by aqueduct from the river Colver, instead of the Thames, as originally contemplated. In *Cunlif v. The Manchester and Bolton Canal Company*, 13 *Cond. Eq. R.* 131 *n.*, a corporation, on the application of a stockholder, was restrained from applying to Parliament for a change in their charter, to enable the

convert a portion of their canal into a railway, and from applying any of their corporate funds to the proposed object. And in *Stevens v. the Rutland and Burlington Rail Road Company*, in Vermont, reported in 1 *Am. L. Register*, 154, the owner of five shares out of ten thousand, obtained an injunction against the corporation's proceeding to build an extension to the originally chartered road against his consent, although the extension was authorized by a supplement to the charter passed by the Legislature. I cite this case not to argue therefrom that such a law as was therein complained of, would, unless it required the consent of all the stockholders, be unconstitutional and invalid. Whether that proposition be true or false is not pertinent to my present purpose; and the case is simply adduced to show, additionally to the others, that a material fundamental deviation from the original idea and intention of the incorporation, affects and contravenes the rights of the stockholders.

To the same effect are also the following authorities:— *Bagshaw v. E. Counties Railway Company*, 7 *Hare Ch. R.*, 114; *Colman v. the same*, 10 *Ch. R.*, 1; *Solomons v. Laing*, 14 *Jurist for Dec.* 1840, 2 *Hare Ch. R.*, 461; *Preston v. Grand Coll. Dock Company*, 11 *Sim. Ch. R.* 327; *Solomon v. Randall*, 3 *M. and Craig Ch. R.*, 444; *Ward v. Society of Attorneys*, 1 *Collyer Ch. R.*, 370; *Angell and Ames on Corp. Sec.* 391, 392, 393. There is a class of cases, to some of which reference was made in the argument, apparently conflicting with those already cited, which seems to me really additional authority in support of the position already maintained. In these cases, the question was whether the alterations in, or deviations from the charter, of which complaint was made, were or were not material or fundamental. Such a case is *Gray v. Monongahela Nav. Company*, 2 *Watts and Serg.*, 150. But it will be found that these cases admit that if the alteration or deviation which was the subject of the suit, extended to "a change in the structure of the company," to use the forcible, but peculiar language of C. J. Gibson, in the case last cited, "it would have been fatal to the position taken by the company."

There was another case cited by counsel for defendants, as conflicting with the views here expressed: *Ware v. The Grand Junction Water Company*, 13 *Cond. Ch. R.*, 126. The facts in that case were these: The plaintiff, a shareholder in the company sued, prayed and obtained from the Vice-Chancellor of England, an injunction against the company's devoting their capital to obtaining a supply of water from the river Colne, when their charter only contemplated the getting it from the Thames, and also against their applying to Parliament for an act authorizing them to use the Colne for such a supply. On appeal, Lord Brougham, then Chancellor, sustained the injunction against the company pursuing their course before procuring such act, but dissolved it so far as regards the contemplated application to Parliament. In answer to the argument based upon this case, it may be said, first, that the opinion of Sir L. Shadwell, V. C., might be well regarded as not inferior in weight on any purely legal matter to that of the Lord Chancellor; and second, that the ruling on the appeal admitted that without a new act, the contemplated change in the original idea of the company, did affect the rights of the stockholders, and thus the case corroborates those already alluded to. Until it was seen what act Parliament would pass, and what conditions it imposed upon the company, the Chancellor might properly think it wrong to interfere. If the new act, like the one in question in this cause, provided for the saving of the rights of all the stockholders, no objection to it could possibly be taken; and besides, after the actual passage of the projected act, it might be that the stockholders would all consent, which would at once do away with all question.

But it is contended on the part of the defendants, that by the sale of their road, no rights of any stockholder in the Elizabethtown and Somerville Railroad Company are affected; that the majority of stockholders have the power and the right at any moment to sell all the property of the corporation and quit business. And that if they pay over to him the profits of the business while it is carried on, and his proportionate share of the proceeds of sale, the "rights"

of every stockholder are satisfied, and he can claim no farther at law or in equity.

I answer, first, if this be so, the proviso in question was singularly useless and uncalled for. No act on the part of the legislature was necessary to protect their rights. They might most safely have been intrusted to the care of this or the other courts. But without dwelling on this observation, is the doctrine contended for true? Is it the law that a majority of stockholders in any corporation, however prosperous its business affairs may be, can, at their own mere caprice, sell out the whole source of their emoluments, invest their capital in other enterprises, and that however the minority may desire the prosecution of the business in which they had engaged, they have no injury to complain of, at law or in equity, so long as they obtain their proportion of the proceeds of the sale?

On principle this position seems to me unsound. If it be true, a minority is entirely in the power of a majority, and the moment a rich man or a few rich men see what they deem a better investment for their money than the corporation in which they are already stockholders, they may compel the poorer members of the company to abandon profits satisfactory to them, and either risk the little they have, according to views from which they differ, or take back their money to lie profitless on their hands, until they find another investment. Or, more nearly to approach the case in hand, as asserted by the complainants, if a rich man, or a number of rich men possess a controlling interest in two roads whose termini meet, one already successful, the other not built or needing nursing care, they may compel the poorer stockholders either to abandon or postpone the profitable use of their share of the capital, or take back their money and give up an investment, which perhaps their own enterprise suggested, and their own perseverence recommended to the attention of others, and hazard the finding of a new investment and a repetition of the same destruction of it. If such were the law, corporations would soon be few, for seldom would capitalists, whatever their comparative wealth,

invest in enterprises so readily rendered profitless at the caprice, or in obedience to the interest of any man or set of men rich enough to control the majority of stock.

That the majority should have the power claimed for them, does not seem to me to be the contract between the stockholders, for there *is* a contract as already shown, in the case of every corporation, between them. That contract is, that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes. Sometimes the duration of such employment is limited in the charter, and then, until that time it must continue so employed, unless, perhaps, in case of clear loss. Sometimes no time is fixed by the charter at which the proposed use of the capital shall cease, and then the contract between the parties is, that so long as the affairs of the company are prosperous, it shall go on, unless all consent to the contrary. The charter of the Elizabeth-town Company defines no period for its expiration; it is however, such a corporation as naturally must, at its origi[illegible], have been expected to continue permanently, and by on[illegible] section of its charter, it is provided that at the end of fift[illegible] years from its completion, the state has the right to take th[illegible] road at an appraisement, a provision which may have bee[illegible] one reason for the privileges conferred. The charter bea[illegible] date February 9, 1831, and there was, of course, at the da[illegible] of the act of 1849, a long period to elapse before the ha[illegible] century expires. True, the present stockholders are not th[illegible] originators of the road, nor do they claim by transfer [illegible] stock from the original holders, but nevertheless, by the a[illegible] legalizing the mortgage of the franchise and property, th[illegible] purchasers at the mortgage sale were substituted to all th[illegible] chartered rights of the first owners of the stock, and th[illegible] charter is still the only evidence of the character of the [illegible] contract. It must be inferred, then, that they, like the fi[illegible] stockholders, expected and embarked their means in t[illegible] enterprise, on the faith that it was to continue, if prosp[illegible] ous at least till the fifty years elapsed.

It can hardly therefore, I think, be argued with just [illegible]

that a majority of the stockholders had a right, upon principle, to sell out all the property of the company from which its profits were to be realized, and abandon the business, and that the minority's rights are satisfied by a division to them of the value of their stock.

Nor does the only case cited on the argument—*Revere v. The Boston Copper Co.*, 15 *Pick.* 351—substantiate any such position as that contended for by the counsel for defendant. The defendants in that case were a manufacturing corporation. Their business had become unprofitable, and a majority of the stockholders had voted to wind up its affairs. The plaintiff, who was a corporator, had also been an agent for them, under a contract for his employment indefinitely, without any limit except his death; and he sued for damages accruing by reason of their refusal longer to employ him. The question in the cause was whether the proceedings taken were a dissolution of the corporation, and whether, after them, the plaintiff could sue on his contract. These questions were decided for the plaintiff, but in their opinion, the court, *arguendo*, replied to a suggestion by defendant's counsel to the effect that the plaintiff being himself a member of the corporation, was bound by its acts, and that since a majority had voted to dissolve and wind up, he was bound by it, though he individually dissented. The court said that this argument could not be sustained. "So far as his rights, duties and obligations as a corporator were concerned, no doubt he is bound, but no farther."

Giving the strongest right to this dictum of the court, as applied to the case before them, it is not, I think, in point here. That was a case of a manufacturing corporation, and therefore not originally to be expected to be of so long duration as a corporation for the establishment of a public road, which was clearly expected to be in operation at least fifty years. And what perhaps is more to the present purpose, the scheme of the Boston Company had proved a failure. Here the bill asserts, and the demurrer admits, that the Elizabethtown Road Company was, at the date of the pur-

chase complained of, eminently prosperous, which is the very gist of the injury alleged to be done to the complainant. Nor can this general language of the court, just cited, be of importance, since the question still remains, what are the "rights, duties and obligations of a corporator?" The complainant in this cause claims not as a corporator, but as an individual contracting with other individuals, all together forming the corporation. The contract is, we will jointly carry on the enterprise projected, and no other, and in carrying it on, the majority shall rule within the terms of our fundamental agreement. But there is no contract that the majority shall have the power to stop carrying it on, and that while it is profitable. And the case in Pickering is expressly to the effect (p. 363) that the votes and acts of a corporation cannot deprive the plaintiff of rights belonging to him as a contractor with the corporation. On this point see also the opinion of Judge Woodbury, already cited.

It may, indeed, be true, as urged in the argument, that corporations have a right to sell their property not limited by quantity; and where they sell, as they buy, for corporate purposes, a court of equity would not, without other circumstances, restrain them. But on the other hand, to cite the language of a learned author, "how far, under what circumstances, and upon what application a court of equity would restrain a corporation from an improper alienation of its property, must depend upon the general principles which guide it in the exercise of its powers; but there is little doubt, that in a proper case made, it would interfere to prevent a disposition of its property *for other than corporate purposes*. *Angell & Ames*, *p.* 190, referring to *Binney's case*, 2 *Bland.* (*Md.*) *Ch. R.*, 142. And the opinion of Lord Eldon in *Natusch v. Irving*, is expressly in point, unless there be a difference in the rights of partners in a joint stock association and in a corporation. In that case, the defendants had offered to pay back all that the orator had paid into the company, with interest, and also fully to indemnify him against all loss by the transactions of the company in the business which was beyond the original articles. Lord Eldon

to this part of the case replies in substance, as already stated, that it is not competent for any number of persons in a partnership (unless so provided for) formed for specified purposes, to affect that formation by calling upon some of the partners to receive back their capital stock and interest, and quit the concern; which, in effect, would be merely compelling them to retire upon such terms as should be dictated to them, so as to form a new company; and he further says, that "*it is the right of a partner to hold his associates to the specified purposes whilst the partnership continues*, and not to rest upon indemnities with respect to what he had not contracted to engage in; and that a partner cannot be compelled to part with his shares, though for double what he originally gave for them; and that it may be his principal reason for keeping them, to have the partnership carried on according to the original contract." If a majority of partners, corporate, or unincorporate, can sell out all their property and satisfy the rights of a dissenting partner, by a simple payment to him of his share, they "*can* compel him to retire," and "form a new company," and utterly evade and set at nought his "right to hold his associates to the specified purposes," and *can* "compel him to part with his shares" at any sum they choose.

It is again urged on the part of the defendants, that the very enacting section of the charter of the Elizabethtown Company gives to the corporation the power of selling and conveying all their property, and that, as this charter is the fundamental contract between the stockholders, the complainant has himself agreed to give to the corporation, and of course to the majority the power of selling this road and all their property, whenever they choose. The words in section first relied upon are these: "And they" (the original corporators) "and their successors by the said name and style (meaning the corporate name just before mentioned) shall be capable of purchasing, holding and *conveying* any lands, tenements, goods and chattels whatever, necessary and expedient to the objects of this incorporation." Now, it is argued, the company have by this language the power to

convey away all they have the power to purchase and to hold.

The argument seems to me more plausible than sound. Admitting that the words used have any greater force or wider meaning than that the corporation should buy, hold and convey, *by that name*, the whole argument falls by simply restating in terms the propositions contained in the words cited. They are these: that the corporators and their successors should, by their corporate name, be capable of purchasing any lands or goods necessary or expedient to the objects of this incorporation—that is, when it is necessary to the objects of the incorporation that it should purchase or hold any particular property, it can do so; when it is necessary or expedient to *the objects of the incorporation* that it should convey any particular property, it can do so. So that it is only when the objects of the incorporation require it, that any lawful conveyance can be made. Can it be pretended that the objects of the incorporation require that the necessary source of its profitable existence should be sold and conveyed away?

There is nothing, I think, therefore, in principle or authority, to shake the conclusion already arrived at, that the sale of this road by the Elizabethtown and Somerville Railroad Company, at a time when its affairs were eminently prosperous, did affect the rights of its stockholders; that they had the right to retain their investment where it was, and as it was, and that their rights are not satisfied by a payment to them of their proportion in the proceeds of such sale.

But the real character of this purchase was such as to bring it precisely within the decisions already quoted. In form, it was a sale of the road; in fact, it was an extension of it—an addition to the originally proposed scheme. The franchises of the company have not in form been destroyed. They may be said to be in a state of suspended animation, and the road is governed by a newly created corporation composed by the union of two previously existing ones; and this consolidated company carries on two enterprises as one

which before were the several tasks and privileges of the originally created corporations. The case is, therefore, almost precisely that adjudicated in *Stevens v. The Rutland and Bennington R. R. Co.; The Hartford and N. H. R. R. Co. v. Croswell*, and *The Union Lock and Canal Company v. Towne*, already cited to show that a deviation from the charter or fundamental articles of association affected the rights of the stockholders. Indeed, in the last mentioned case, the supplementary act placed one company under the charter of the other, just as in this case the road sold becomes a part of the Somerville and Easton Railroad Company, and its further maintainance, use and enjoyment is regulated and governed by the provisions of the last named company's charter.

If, then, the purchase authorized by the act of 1849, supplementary to the charter of the Somerville and Easton Company, did affect the rights of the stockholders in the Elizabethtown and Somerville Company, it seems to me to follow necessarily that the legislature intended, when they provided that nothing in that *act* contained should in anywise affect any right whatever, either at law or in equity, of *any* stockholder in the Elizabethtown and Somerville Railroad Company, that such purchase should not occur without that which alone could prevent its affecting such rights, viz: the *consent* of every stockholder. Their language is, buy, but see that you buy in such a manner as not to affect the right of any stockholder. And as buying will affect those rights, unless the stockholder consents to the sale, that consent is required. And such a conclusion seems entirely clear from the subsequent language of the same section almost immediately following. It proceeds to provide that the Central Railroad Company shall, on the completion of the purchase, become responsible thereby for all debts contracted by the Elizabethtown and Somerville Company since the foreclosure of the mortgages under which its *present* stockholders claim to hold the said road, and closes with these words: "Provided also, that the said purchase shall be made with the consent of the last mentioned stockholders."

Now the "last mentioned" stockholders are the *present* stockholders, since the foreclosure of the mortgages, of the Elizabethtown and Somerville Railroad Company. And the plain meaning af the legislature seems to me to be expressed by putting the two clauses together, thus, "nothing in this act contained shall in anywise affect any right whatever in law or in equity of *any* stockholder in the Elizabethtown and Somerville Railroad Company; and such purchase shall be made with the consent of such stockholders, that is to say, the *present* stockholders of said company." The first clause of the proviso had in effect required the consent of all the stockholders of the company selling, to the sale, but it had not, it was thought, clearly designated what stockholders. It seems as if the insertion of the intermediate proviso brought this to mind, and thereupon were added the words which defined that the consent already impliedly required of all the stockholders, should be given by all the *present* stockholders, in contradistinction to those who owned the road prior to its sale under the foreclosure.

I cannot agree with the position taken by the counsel for the defendants, that this proviso only refers to the enactments contained in the section in which it is used, and not to the act in general. Its first clause refers in terms to the whole act. "Nothing in *this act* contained," &c., and it would, to my mind, be an overstrained conclusion from any rule for the construction of statutes, to make the last clause apply only to the section in which it is found, because it did not repeat an express reference to the whole act. Nor is there any reason for so doing, (There have been many rules laid down by great lawyers for construing statutes, but they are reducible to one—find out the *intention* of the legislature.) The two succeeding provisos follow and hang upon the first; and there is not a reason for applying the third proviso to the enactments contained in that section which does not apply as strongly in favor of extending it to the whole act.

In the view I have taken of this act, it is entirely unnecessary for me to enter upon the interesting question so ably discussed by counsel on either side, whether the act would

not be unconstitutional because impairing the obligation of contracts, unless it provided for the consent of all the stockholders. It is a question of too much importance needlessly to be approached. The intention of the legislature in the law under examination seems clear; and it is not for me to volunteer an opinion indirectly bearing upon the rights of many parties not litigant here.

Nor, for the same reason, will it be necessary for me to discuss or decide another point raised on the argument, to wit: that if an act authorizing any deviation from the original charter, and not requiring the consent of all the stockholders, be unconstitutional, then the supplement under which the complainant and all the stockholders hold who claim under the mortgage sale, is unconstitutional and invalid, because that act legalized the mortgage of the franchises of the corporation on the consent of only two-thirds of the stockholders; and therefore the complainant has no right in this court. It is enough to say, this act does require the consent of all; and it does not lie in the mouth of the defendants to impugn the title under which both they as well as the complainant hold. They were joint owners with him, and they have no right to take all, and then contend that neither he or they had any right. They were trustees for him, and they cannot dispute their contract to deal with him as a beneficiary, and keep everything to themselves.

Another point was made by counsel for defendant, to which it is proper that I should allude. It is that this act of 1849, is one instance of the exertion by the legislature of the right of eminent domain, the taking private property for public use, on making just compensation therefor.

If I have rightly viewed the subject, the doctrine of eminent domain has no application to the case. The act of 1849 has nothing in common with the statutes under which property is taken for public use. It does not authorize the Easton Road Company to take, but only to buy the road belonging to the Elizabethtown Company. It does not provide for any compensation, or any means of estimating what

shall be just. No commissioners are provided for—no appeal given to a court or a jury. The law simply confers new powers upon the Easton Company, that is, to buy out the other, and if they cannot bargain to pay in stock, issue enough to do so, and without in terms conferring any power on the Elizabethtown Company to sell, provides, as I read it, that if they sell, it shall be in such a way as not to affect any right of any stockholder, but with their consent. I cannot see in all this, any ground for mooting the doctrine of eminent domain.

Again, it was urged on the argument that there are various acts on the statute book, supplementary to charters of other companies, in which material deviations from their original enterprises were authorized, without requiring the assent of all their stockholders respectively, and hence it was argued that the legislature did not intend to require by this act that assent. One of the acts to which reference was made, required only the assent of the company under the corporate seal; another of seven-eights of the stockholders; another two-thirds of three-fourths; and still another of a majority of the stockholders, while other acts cited required no assent at all.

To examine and decide upon the intention of the legislature in each of these acts, would be entirely beyond my duty at the present time. It is enough to say, that each of these acts had its peculiar object, and that the intent of the law-makers was different in each. No argument can therefore be rightly drawn from them to bear upon the present case. No such language as that in the act under review, is contained in either of them. And if the legislature, when intending to require the consent of a majority of the stockholders only, did, as in one of the acts referred to, expressly say so, perhaps the fair inference would be, that if by the act under review they had intended to require no more, they would have said so in terms again.

I have thus disposed of the first and main topic of discussion in this cause—the proper construction and meaning of the proviso in the act of 1849. I am satisfied, and do so

with great respect, report to and advise the Chancellor that the proviso requires the consent of all the stockholders of the Elizabethtown and Somerville Railroad Company before the purchases authorized by that act becomes valid.

Another topic still remains.

II. Admitting this consent of all the stockholders to be necessary, can the remedy sought be given in the present suit?

The objection is, that the Elizabethtown and Somerville Railroad Company has not been made a party to this bill, and that until they are parties, the complainant is not entitled to the relief prayed.

The parties defendant are the directors of both roads, the same individuals to whose action is ascribed the injury complained of, and the Somerville and Easton Railroad Company who, with full knowledge of the illegality of their proceedings, are now in possession of the road, the personal property, every thing belonging to the complainant's company, except the naked franchise.

And he prays—

1. A discovery of what they have done in regard of this purchase.

2. The amount of the property and net earnings of the Elizabethtown Company since the foreclosure sale.

3. An account by said defendants with the complainant, his company, and all the stockholders, respecting said property and earnings.

4. A discovery as to the bonds and mortgages.

5. A decree that the purchase, sale, and mortgages are invalid and void.

6. And an injunction against any further issue of bonds and mortgages, pledging the road of the Elizabethtown Company.

I cannot see that the Elizabethtown Company is a *necessary* party in order to any one of the different kinds of relief here prayed. A proper party they might be, and companies sustaining their position are in fact made defendants to every case at all resembling the present, to which I have re-

red. But the bill is directed against the directors, as dividuals, for breach of trust, and against the Easton ompany as recipients of the trust property, with knowledge f the alleged wrong. The Elizabethtown Company may be nterested as a corporation in sustaining the validity of the alleged sale, but the complainant properly seeks his discovery and account from those who, he alleges, have taken his property and applied it to other purposes than those to which, according to the charter, it was to be applied. All the real parties are already defendants, formally, it might have been better that the Elizabethtown Company should have also been brought in. The case of *Solomons v. Laing*, 14 *Jurist*, is much in point here. There the question was whether the company who had reaped the benefit of a similar transaction was a proper party. And the court held they were *the* proper party, jointly with the individual directors. In that case the complainant's company were the defendants, but no relief was prayed against them except costs.

There is no demurrer here for want of parties. The objection was not taken till the hearing of a general demurrer to the equity of the bill. In such a case the rule is, that where the omitted parties are merely formal, the court will be indisposed to listen to the objection at the hearing, and if it can properly do so, will dispose of the cause upon its merits, without requiring such formal parties to be joined. *Story Eq. Pl.*, *p.* 542.

It seems to me that this is a case within the rule, and that there is no reason why the cause should not be disposed of upon its merits, though the Elizabethtown Company has not been brought in as a defendant.

Upon the whole case, I respectfully report to and advise His Honor, the Chancellor, that the demurrer of the defendants be overruled with costs.

CORTLANDT PARKER,
Master in Chancery.



JOHN DEAN and AARON DEAN *v.* THOMAS DEAN and others.

In cases for specific performance of agreements it is now well settled, that if the defendant, by his answer, admits the parol agreement, and insists on the benefit of the statute of frauds, he will be fully entitled to it, notwithstanding such admission. But if he admits the parol agreement, without insisting on the statute, the court will decree a specific performance, upon the ground that the defendant has thereby renounced the benefit of the statute.

The same rule of pleading is applicable to cases where a bill is filed to enforce a parol trust.

If the court can execute the trust from the admissions made by the answer, so that the complainants are not under the necessity of resorting to *parol proof* of the trust, to entitle them to relief, such admissions will exclude the defendants from the benefit of the statute, if not insisted upon by the answer.

A court of equity acts in analogy to the law, in applying the statute of limitations. "As long as there is a continuing and subsisting trust acknowledged or acted on by the parties, the statute does not apply; but if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes *adverse*, lapse of time from that period may constitute a bar in equity." What lapse of time will constitute a bar must depend, in a measure, upon the nature of the trust, the relative situation of the parties to the subject matter of the trust, and other attending circumstances.

Where a party has slept over his rights for more than twenty years, and has been grossly negligent in not asserting them, when fitting opportunities have presented; where he has recognized or acquiesced in acts inconsistent with the existence of any trust; and where his conduct has been such as to involve innocent parties, as against them the court will never execute the trust.

This was a bill to enforce a trust. The cause was heard upon the pleadings and proofs. All the material facts disclosed, appear in the opinion of the Chancellor.

W. H. Leupp and *P. D. Vroom*, for complainants.

R. S. Field and *W. L. Dayton*, for defendants.

THE CHANCELLOR. On the 13th day of October, 1812, the real estate of John Dean, situate in the township of South Brunswick, in the county of Middlesex, was sold by the sheriff, by virtue of an execution at law in his hands. It was struck off to Abram Dean, the brother of John, for the

sum of three thousand two hundred and seventeen dollars and two cents, to whom the sheriff executed a deed.

The bill alleges that the purchase was made under the following agreement, entered into previous to the sale, between Abram and John, "that a re-sale of such real estate, or so much thereof as might be needful, and for that purpose ufficient, to pay and satisfy the debts of said John Dean, and after that, reconvey the residue, if any remained unsold of such real estate, or account for such balance of the proceeds of the sale of the whole, as should remain over and above the payment of the debts of said John Dean." I have stated the alleged agreement, in the language of the bill.

John Dean and Abram Dean are dead. The bill is filed by the two sons of John, his only surviving heirs, and who claim the benefit of the trust also, as devisees of their father. The only defendant who has any knowledge of the transaction, is Thomas Dean, the only surviving son of Abram. He, and his sister Mary hold, as devisees of their father, a portion of the land, the subject of this controversy. Of the other defendants, three of them are minors, and all of the defendants have an interest, or have had an interest which they have disposed of, in the said land, through Thomas Dean, a deceased son of Abram. All of the defendants have united in an answer to the bill. The statements in the answer, of importance, are made by Thomas; the other affirming their belief that such statements are true.

The defendants admit that the purchase was made by Abram Dean, under the following circumstances and agreement: The property being advertised for sale by the sheriff, John applied to his brother Abram, and proposed that Abram should become the purchaser at the sheriff's sale, and that Mary Dean, the wife of John, should join in a conveyance, by which her right of dower should be barred and extinguished; and that Abram, thus having a clear title, free from all incumbrance of dower, might be able to sell the said real estate for much more than he would be obliged to pay for it, subject to such incumbrance, and that out of this



surplus he might make some provision for the support and assistance of his brother Thomas.

Before looking at other facts of the case, we have enough before us to dispose of an objection, which the defendants interpose, *in limine*, to any right of the complainants to relief. It is insisted, on behalf of the defendants, that it is a trust or confidence of lands, not manifested and proved by any writings, which the complainants are seeking to enforce. Against the relief sought, the defendants claim the benefit of the statute for the prevention of frauds and perjuries.

Are the defendants entitled to the benefit of the statute? They have not pleaded the statute; and it was not necessary they should do so. But not having pleaded it, are they entitled to its benefit, unless they claim it by their answer?

In cases for specific performance of agreements, "it is now well settled, that if the defendant should, by his answer, admit the parol agreement, and should insist upon the benefit of the statute, he will be fully entitled to it, notwithstanding such admission. But if he admits the parol agreement, without insisting on the statute, the court will decree a specific performance, upon the ground that the defendant has thereby renounced the benefit of the statute." *Story Eq. P.*, § 763. There is no good reason why the same rules of pleading should not be applicable to cases where a bill is filed to enforce a parol trust. In either case, a naked plea may not be sufficient. If any special matters are set up in the bill, which, if true, would avoid the statute, the plea must contain averments negativing such special matter; and the answer, in support of the plea, must contain a full discovery of the matters set up in avoidance of the bar. If the answer denies the agreement of which specific performance is sought, or denies the trust, it is not necessary to claim, in the answer, the benefit of the statute; and for this reason: when the complainant comes to prove his case, he is obliged to resort to parol evidence for the purpose, and such evidence is inadmissible. The reason, why the court will execute a parol trust admitted by the answer, is, because

it takes the answer as the writing by which the trust, in the language of the statute, "is manifested and proved."

But it is said, for the defendants, that the answer denies the trust, and that they are, therefore, entitled to the benefit of the statute. Is there such a denial of the trust by the answer? The true test is this: if the court can execute the trust from the admissions made by the answer, so that the complainants are not under the necessity of resorting to parol proof of the trust, to entitle them to relief, such admissions will exclude the defendants from the benefit of the statute, if not insisted upon by the answer. For how can the answer be said to deny the trust, if, upon its admissions, the court can execute the trust? The point is, not whether the answer denies the trust, *modo et forma*, as alleged in the answer, but is there such a substantial denial of it as to prevent the courts granting the relief upon the principle, that the complainant can recover only *allegata et probata?*

The trust, as alleged in the answer, is substantially this, that Abram Dean should buy the property; that he should hold it as a security for the purchase money, and that John Dean should have the benefit of its value over that amount. The defendants admit that this was the trust upon which the purchase was made; but then they allege that it was part of the agreement between Abram and John, upon which Abram agreed to assume the trust; that John Dean's wife should release her dower-right in the property, which she afterwards refused to do. But did this refusal deprive John of all interest in the purchase? Both of the brothers relied upon the wife's releasing. Both were disappointed in this expectation. But should John alone suffer from her refusal, and Abram reap the benefit of it? It appears sufficiently in evidence, that in consequence of this arrangement, the property sold for much less than its value. It would be unjust; if Abram could have held the property, discharged of the trust, in consequence of John's wife's refusal to release her dower. Suppose that on the day after the sheriff's sale, and after the wife's refusal to release her dower, Abram had sold the property for six thousand dollars; could it be,

that a court of chancery would not compel him to account for the profits? It appears to me, that the answer contains such an admission of the trust alleged in the bill, that the court can execute it without the assistance of parol testimony; and that therefore, the defendants not having insisted on the statute for their protection, they must be considered as having renounced the benefit of it.

The question remains—are the complainants entitled to any relief upon the case as it stands, by the pleadings and proofs before the court?

This trust was created in 1812, thirty-nine years before the bill was filed. The youngest of the complainants became of age more than twenty-eight years prior to the filing the bill. The defendants interpose the *lapse of time* to the complainants' claim for relief. The complainants insist that in cases of trust, *lapse of time* is no bar.

"As long as there is a continuing and subsisting trust acknowledged or acted on by the parties, the statute does not apply; but if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes *adverse*, lapse of time from that period, may constitute a bar in equity." (*O. and J. Kane v. Bloodgood et al.*, 17 *J. C. R.* 90.)

"Even in cases of express trust, if the parties have long ceased to act upon, or recognize them, courts of equity will not interfere to enforce them; and *a fortiori*, not in cases of mere constructive trusts, (*S. Eq. P.* § 756,) courts of equity fully recognize the maxim, *vigilantibus, non dormientibus, jura subvenuant* as well in matters of trust as in other cases. What lapse of time will constitute a bar, must depend in a measure, upon the nature of the trust—the relative situation of the parties to the subject matter of the trust—and other attending circumstances. Where a party has slept over his rights for more than twenty years, and has been grossly negligent, in not asserting them when fitting opportunities have presented; where he has recognized, or acquiesced in acts inconsistent with the existence of any trust, and where his conduct has been such as to involve innocent parties, as against them the court will never execute the trust.

Let us examine the character of this trust, and the conduct of the complainants in regard to it.

All the right, or equity, which John Dean had in the land after it was conveyed by the sheriff to Abram, was a right to redeem it at the price for which it was purchased. Abram Dean was under no obligations to sell the property in any particular manner, or to hunt up a purchaser. When John Dean could find a purchaser who was willing to make good to Abram his advances, he had a right to call upon Abram for a conveyance, The situation of Abram Dean was like that of a mortgagee in possession. He held the land to reimburse himself for the money he had advanced upon it. The statute delares "that if a mortgagee and those under him be in possession of the lands, tenements, and hereditaments, contained in the mortgage, or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption therein shall be forever barred." As a court of equity acts in analogy to the law in applying the statute of limitations (*S. Eq. P.* § 756; ***Dexter et al. v. Arnold et al.***, 3 *Sumner's Rep.*, 152), and as the trust created by the original parties, was similar to that which exists between mortgagor and mortgagee, the defendants have some ground for insisting that the mere lapse of twenty years is a bar to a trust similar to that which is now sought to be enforced against them.

But the defendants do not rest their defence here. They insist, that John and Abram Dean, during their life time, ceased to act upon, or recognize the trust; and that since their death, the complainants have acquiesced in its abandonment.

The bill admits, that soon after the delivery of the sheriff's deed, Abram entered upon the possession of the property, that he cut down a valuable portion of the wood, and treated the property as his own. It is true, the bill alleges that John Dean remonstrated with his brother against these acts, and accused him of not intending to recognize the trust. But there is no proof of this, and even if there was, it would establish the fact, that Abram was using and occu-

pying the property in a manner adverse to the recognition of any trust. John died in 1815, and in the following year his brother died. There is no evidence that John ever called upon Abram to execute the trust, or charged him with the abuse of it. These are indeed, very slight circumstances to show that the trust was abandoned by their common consent; but they amount to some evidence. The subsequent conduct of the complainants is wholly inconsistent with the existance of a trust in which they were interested. Let us examine it.

On the 5th day of September, 1816, an agreement, in writing, was entered into between the executors of Abram Dean and Mary Dean, the mother of the complainants, respecting her dower. In this agreement, the land, the subject of this controversy, is recognized as the absolute property of the estate of the late Abram Dean, and as formerly belonging to John Dean, deceased; and Aaron, one of the complainants, signed this agreement as a subscribing witness. On the 27th of March, 1817, the widow's dower in this property was assigned to her. She entered into the possession of the part assigned her, and Aaron occupied the property with her, except a very short interval of time, up to the year 18—. In 1821 a partition of this property was made between the three children of Abraham, his devisees. Mary Van Pelt, one of these children, held her portion by a trustee, for many years, and then it was sold. Aaron, another of these children, died in 1849, after devising his portion for the benefit of his wife and his children, some of whom are minors, and are defendants in this suit. The greater part of this portion has been sold, and has passed into other hands. These various dispositions of the property have not been made without the knowledge of the complainants. They are all stated in the bill, and without any pretence by the complainants that, during all these transactions, they, or either of them, have ever asserted any right in the property, or given any notice of the claim which they now set up. Since their father's death, Aaron, one of the complainants, has always lived in the immediate vicinity of the land, and for a large portion of that period upon it, and

the other, at not a greater distance from it than the city of New York. What excuse do they give for sleeping over their rights; for not giving notice of their claim; for acquiescing in acts inconsistent with it; and for thus involving these defendants, who are innocent parties in this transaction? Their only excuse is, their poverty. If that prevented their asserting their rights in a legal tribunal, it was no obstacle to their giving a friendly notice to innocent parties, who were entirely ignorant of any such claim as these complainants are now endeavoring to enforce against them. "Where a bill in equity is brought, after a great lapse of time, it is incumbent on the plaintiff to state the reasons why it is not brought before, in order to repel the presumption of laches or improper delay." *Stearn's Adm. &c. v. Page*, 1 *Story's Rep.*, 204. That was the case of a bill brought by an administrator *de bonis non*, for an account of the intestate's estate, after the lapse of from twenty to twenty-five years, and the defendant pleaded the statute of limitations, and filed a general answer to the whole bill; and the court said, "after such a lapse of time, it being between twenty and twenty-five years after the alleged transactions took place, and ten years after the death of the administratrix, the court have a right to require, before the bill is entertained, that a clear case should be made out, upon the very face of the bill, calling for its interposition, and showing that the parties in interest have been guilty of no negligence or undue delay, in not applying for relief at an earlier period."

Here is not mere length of time unaccounted for, which is, of itself, evidence of gross negligence and laches in the complainants, (*S. Eq. P.* § 756 *a*); but the complainants' own acts, and their acquiescence in the acts of others, bear strong testimony to their having ceased to act upon or recognize the trust. The defendants have made a complete defence to the complainants' case, under the general rule as laid down in *Baker et ux v. Whiting et al.*, 3 *Sumner's Rep.*, 476. "In equity, length of time is no bar to a trust clearly established; provided, no circumstances exist to raise



presumption from lapse of time, of an extinguishment of the trust, and no open denial or repudiation of the trust, is brought home to the knowledge of the parties in interest, which requires them to act as upon an adverse title."

I am satisfied that this case is one, both upon the pleadings and proofs, in which no relief can be afforded the complainants, without doing the defendants great injustice, and that the court ought not, under the circumstances, to interfere in the cemplainants' behalf.

I have not noticed that part of the case about which much was said on the argument, as to to how and how much of the consideration money was paid. I think the sheriff's receipt and statement, ought to be considered, at least *prima facie* evidence, that the consideration money was all paid. After an expiration of more than thirty years from the death of the original parties, to require of these defendants any further evidence on this point, would, I conceive, be a great hardship.

The bill must be dismissed, with costs.

Between THE PATERSON AND HUDSON RIVER RAILROAD COMPANY, complainants, and THE MAYOR AND COMMON COUNCIL OF JERSEY CITY, defendants.

Certainty to a common intent is sufficient in bill or answer.

If a fact is stated anywhere in the stating part of the bill, with legal certainty, and is material, it is well pleaded, and therefore admitted by the demurrer.

"*Inasmuch as*" is sufficiently direct and positive; more direct than any statement under a *whereas* in a declaration, than which, a bill in equity need not be more certain.

The rule, as to the jurisdiction of this court to prevent by its interposition, the further litigation of a matter at law, is that "courts of equity will not interfere before a trial at law, nor until the right has been satisfactorily established at law. But if so established, it is not material what number of trials have taken place.

This cause was referred by the Chancellor to George H. Brown, one of the masters of the court. The material facts disclosed by the bill, and the causes assigned as grounds of demurrer, appear in the opinion of the master.

THE MASTER. This cause was referred by the Chancellor, to the subscriber, one of the masters of the court, to hear and report upon the question presented.

The object of the bill is to prevent further litigation of a question which the complainants allege has been fully settled by repeated decisions. It is properly called a bill of peace.

The defendants have demurred, and by the demurrer admit all the facts in the bill, which are well pleaded. In order to the consideration of the question, it is necessary to inquire what these facts are.

The bill states (among other things) that complainants were incorporated under the name of "The President and Directors of the Paterson and Hudson River Railroad Company," by an act of the legislature of this state, passed in 1831, with power to hold lands necessary or expedient

the object of the incorporation, that by the said act, after the expiration of ten years, the company were to pay yearly a tax of one half of one per cent. upon the capital stock paid in, and that no further or other tax or impost should be levied or assessed upon the company.

That soon after the passage of the act, the company was organized according to its provisions and constructed a railroad, and have since paid large sums of money to the state, on account of tax.

That the company purchased a number of lots at Jersey City for the purpose of a depot, that they were used only for that purpose, and were necessary and expedient to the objects of said incorporation.

That the defendants were incorporated by act of the the legislature, February 22, 1838, by the name of "The Mayor and Common Council of Jersey City."

That in the year 1839, the defendants assessed the said lots at Jersey City for taxes, for state, city and county tax, John R. Goodman being assesor—that to try the question whether the city had the right to make such assessment, the complainants brought a certiorari to the supreme court—that in each of the years, 1840 (Henry Southmayd being assessor) and 1841 (Charles Gardner being assessor), the city again assessed the said lots, and the complainants brought their certiorari to the supreme court from each assessment.

That while the three suits upon certiorari were pending, undetermined, viz: 9th May, 1842, the attorneys of the complainants and defendants agreed, in writing, that the trial of the suit against Gardner's assessment should be conclusive of all the three suits, and judgments be entered in them all, in conformity with the decision of the supreme court in that case, and of the court of errors, if a writ of error should be taken.

That in November term, 1842, the supreme court set aside the Gardner assessment, and defendants took a writ of error to the court of errors, and in July, 1845, that court affirmed the judgment of the supreme court—that, thereupon judg-

ments were entered in all the three suits, according to the agreement.

That in the years 1845 and 1846, the defendants again assessed the same lots for taxes, and that they were advertised for sale.

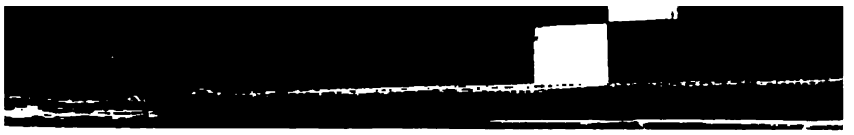
Prayer for perpetual injunction. To this bill the defendants demur, and assign several causes, which it is understood embrace all the grounds upon which the defendants rely to sustain their demurrer. First—cause of demurrer is in substance that the bill does not set forth whether the assessment by the defendants, and which was adjudged by the supreme court to have been illegally made, was for state, county or city purposes, nor whether the assessment of 1845 and 1846, were for state, county or city purposes, so that the bill does not show whether the assessments of 1845 and 1846 are of the same character as those adjudged to be illegal.

If this were true, in fact, the demurrer should be sustained, but upon examination, the bill shows that the decision of the supreme court in the Gardner case covered, so far as respects these defendants, every kind of *tax* known to the laws of this state.

The bill states expressly, that the assessment by Goodman was for *state*, *city* and *county* tax.

The Gardner case was taken by agreement of the parties to represent the others in the whole question involved. The agreement, in effect, is that the Gardner case should be taken as a state of facts by which the other cases were to be determined, and that the argument, deliberation and judgment in that case, should be conclusive in them all. Under this agreement, the assessment of Goodman was, by the judgment of the supreme court, set aside, and it is not for the defendants to say that the judgment so rendered, with their consent, is not decisive of the question involved in that case; especially when it is not shown affirmatively that the facts in it, and that of Gardner differ.

But again it is averred with sufficient certainty, that the *same question* arose in all the cases. The rules of this court



require certainty in pleading, but certainty to a common intent is sufficient in bill or answer. The bill, after stating the assessment by Goodman particularly, and the subsequent assessments generally, introduces the agreement referred to as follows: "That" (the parties, &c.) "in order to save the expense of all these suits, and inasmuch as the same question would arise in all the said suits entered into, &c., setting forth the agreement." If after the statement, particularly of the first assessment, the bill had alleged that the subsequent assessments were like it, it would, besides being sufficiently certain, have had the merit of certainty without prolixity, but saying that the same question arose or would arise, is equivalent to saying that the same state of facts existed, or that the same kind of taxes had been laid in each case.

Some question was made upon the argument as to the form and connection of this averment. It was said not to be such a statement of facts, as should be held to be admitted by the demurrer. The form of the allegation is direct and positive. "Inasmuch as," is equivalent to saying, seeing that or the fact being that the same question would arise, &c. This is more direct than any statement under a whereas in a declaration, than which, to say the least, a bill in equity need not be more certain.

It is true that the allegation is *not* found in connection with the statements of the bill, as to the form and effect of the assessments, and that it *is* found in connection with the statement of the agreement and is introductory to it. But if the fact is stated any where in the stating part of the bill with legal certainty, and is material, it is well pleaded, and therefore admitted by the demurrer.

The demurrer then admits the judgment of the supreme court in all the cases, to have been that taxes for state, county or city purposes, against the complainants for these depot lots, were illegal.

It was not, therefore, material to state in the bill for what kind of taxes the assessments of 1845 and 1846 were made. If for taxes at all, they must have been for one of the three

kinds adjudged to be illegal. If either had been legal in the opinion of the court, the assessment for it would have been sustained. *State v. Falkenbridge*, 3 *Green Rep.*, 320.

When the bill speaks of taxes, it cannot be construed to mean assessments against the complainants, as owners of the depot lots for improvements by which these lots would be especially benefitted, such as grading the streets or paving the walks in front of them. Such assessments I do not regard as taxes within the legal meaning of that term. A tax is laid upon all persons and their property alike, but such assessments as are here referred to, are made against certain property, because it will, more than other property, be increased in value by the expenditure of the money so assessed. They are called assessments to distinguish them from ordinary taxes. The second cause of demurrer is, that the bill does not show whether the complainants seek to enjoin the defendants against making assessments for city purposes or county purposes.

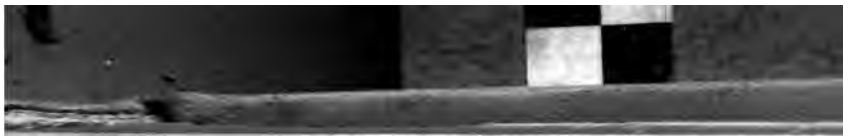
The bill prays that the defendants may be enjoined against assessing any tax upon the lots in question. According to the view taken above, this is sufficiently definite. It embraces all the three kinds of tax assessed by Goodman, state, county and city tax.

The third cause of demurrer is, that the bill does not show any sufficient matter of equity to entitle the complainants to the relief sought.

This presents the question, whether the adjudication of this matter at law has been such as to satisfy this court that further litigation of it should be prevented by its interposition.

The rule as to this jurisdiction of the court of chancery, is thus stated by Judge Story: "Courts of equity will not interfere in such cases, before a trial at law, nor until the right has been satisfactorily established at law. But if so established, it is not material what number of trials have taken place, whether two only, or more. 2 *Story Eq. Com.* § 859.

This is not a technical rule by which the jurisdiction of



this court is made to depend upon the number of trials. If it were so, it might be contended that three cases were tried, though the parties agreed to have them tried at one time. But I do not so regard the rule. In some cases one trial would not be considered as conclusive or satisfactory, as when facts are in dispute, depending on the testimony of witnesses, and the trial necessarily by jury. But in these cases the facts were admitted; a question of law only to be considered, and that deliberately done in the supreme court and court of errors, with the same result in each court. Nothing appears or is suggested to create a doubt, but that this decision is satisfactory and would be sustained.

Indeed when it is considered that this same question has been decided at law in several cases between other parties in the same way, it is hardly to be expected that the law courts would again hear it argued, unless something to justify a re-argument was shown there, which does not appear here. The exemption of the railroad companies of this state from taxes under the same charter provision, has been so fully and frequently argued and decided, that no change in the rule can be anticipated, unless some new fact bearing upon the question, or some new view of the question itself is presented. If any such exists, it ought to appear by answer to the bill.

It is, therefore, respectfully submitted to the Chancellor, that the demurrer ought to be overruled.

HENRY L. MASSAKER v. CHARLES MACKERLEY AND WIFE.

Where a bill is filed to foreclose the equity of redemption, and for sale of property to satisfy what is due on a mortgage, it is no defence that the money would have been paid at the time it became due, had not the complainant, a year before, in conversation, told the defendant that he did not wish him to pay any more of the principal when it became due; and that if he needed it, he would give timely notice, and that no notice had been given.

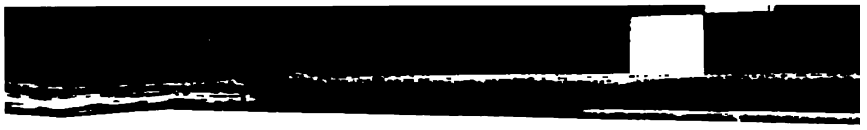
Such a promise amounts to nothing, being made without consideration.

Where a bond and mortgage had been surreptitiously taken out of the complainant's possession, and the defendant did not doubt it, it was held to be no ground of defence, that the defendant was not bound to pay the money, unless the complainant produced the bond and indorsed the payment on it, or gave the defendant a sufficient indemnity against the bond and mortgage. The receipt of the complainant for the amount was good against all the world.

Such a defence is not of a character to throw the burthen of any cost upon the complainant.

On the 29th of March, 1849, the defendant, Mackerley, executed to the complainant two bonds; one to secure the payment of one thousand dollars, in one year, and the further sum of one thousand dollars in two years from date, with interest on the whole sum, payable annually; the other was to secure the sum of three thousand dollars, as follows: one thousand dollars on the first day of April, 1852; the further sum of one thousand dollars on the first of April, 1853; and the further sum of one thousand dollars on the first of April, 1854, with interest on the whole sum, payable annually. To secure the payment of these bonds, the defendants executed to the complainant a mortgage on certain lands which the complainant had conveyed to Mackerley, and to secure a part of the purchase money, of which the said bonds and mortgage were made and executed as aforesaid.

The bill was filed on the 28th day of May, 1852. It alleges that the first bond was paid at maturity; but that the sum of one thousand dollars, the principal due on the other bond on the first day of April, 1852, remains unpaid.



The bill further alleges that the said bond and mortgag are lost; that the complainant kept them locked up in h bureau, and that on or about the 2d of August, 1851, the were taken away; that after diligent search, the complainar has been unable to find the same, but believe that they wer carried away by Hannah Massaker, his wife, who, about th time the bond and mortgage were taken, left his house witl out provocation, and has since resided in Morris county that on the first of April, 1852, the defendant, Mackerle paid the interest on the said bond, and upon the principal c one thousand dollars being demanded, said, he had not pro vided the same. The bill alleges that the defendant ha knowledge where the said bond and mortgage are.

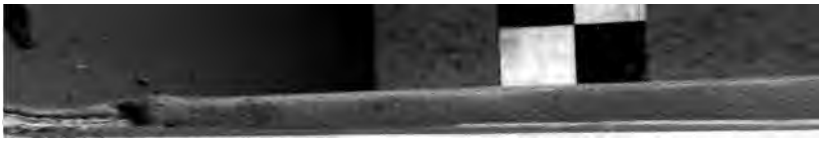
The object of the bill is to foreclose the equity of redemp tion, and for sale of the property to satisfy what is due o the mortgage.

On filing the bill an injunction was granted to prevent th payment of the money due, and to grow due, on the los bond, to any other person than the complainant.

The bill was answered by Charles Mackerley. He does no suggest, in his answer, any doubt as to the loss of the bond and mortgage, in the manner alleged by the complainant, but sets up the following defence: He says that on or about the first of April, 1851, at the time he made the last payment of one thousand dollars on the first bond, the complainant told him that he did not wish him to pay any more of the principal when the same became due: that all the complainant wanted was his interest, and that if the defendant paid the said principal, he, the complainant, would be obliged to loan it out again, and he wished the defendant would keep the money and pay him the interest therefor, or words to that effect. That the defendant replied, that he did not like to have the matter remaining in that situation, because if he relied upon the complainant, and failed to raise the money when it became due, complainant might then call upon him for the said sum of money, and put defendant to great inconvenience to raise the same. Whereupon complainant told defendant he need have no fears on that account,

because that if he, the complainant, should happen to stand in need of the said payment when it became due, he would give the defendant timely notice of it, so that he would be able to raise the same. He says, that relying upon this promise of the complainant, he did not take especial pains to raise the whole of the said sum of one thousand dollars, to make said payment on the first of April, 1852, as he otherwise might and would have done. He further says, that on the first of April, 1852, he called on the complainant and told him he wished to pay the interest, but that he did not feel safe to pay the principal until the bond and mortgage could be found, so that the payment might be indorsed on said bond; to which complainant replied, he had promised the money to one Samuel Van Blarcom, if defendant paid it in. Whereupon defendant reminded complainant that he had said to defendant he did not want the money, and that h promising it to another, without giving defendant notice, w contrary to his agreement: which complainant did not den but replied, that he thought now his bond and mortga were gone, he ought to have his money, or words to th effect, but that the complainant, neither on that day, or any other time before the commencement of this suit, m any other demand or request of payment. He further s that in the same conversation, he told complainant, tha if the bond and mortgage could be found, so that the payn could be indorsed thereon, he could and would raise the payment in a very short time, if the said complainant w procure the said bond and mortgage, but he then insis and now, by his answer, insists, that he could not with sa pay to the complainant, the said sum of one thousand dol so long as the said bond and mortgage were outstandi the hands of some person unknown to the defendant, wit some indemnity, more than a mere receipt, and without satisfactory evidence that the said bond and mortgage not been assigned by the complainant to some other per that he was then willing, and told defendant he was wi to make the payment whenever he should be indemnifie

The answer admits, that on or about the first of A



1851, the said Hannah, wife of complainant, came to defendant's house, and told him that she had left complainant, and had taken his papers. That defendant asked her what papers? and she said she did not know; that she had a note of one Ackerman, and complainant's papers, done up in a package; that defendant immediately told her that the papers were of no use to her; but defendant says he has no recollection that the said Hannah made any mention whatever of the said bond and mortgage; that defendant supposed she had taken the papers back to complainant, until a day or two afterwards. Complainant called upon defendant and notified him that the bond and mortgage were gone, at which time the said Hannah denied that she had the said bond and mortgage, or that she had taken them away. Defendant denies all knowledge as to who took the said bond and mortgage, or as to who has them.

The defendant by his answer admits, that inasmuch, as he was prevented from paying the said sum of one thousand dollars, by the request and solicitation of the complainant, and by his promise to notify defendant, if he would need said payment, that it would be inequitable and unjust, and would be enabling the complainant to take an undue advantage of the defendant, for this court to decree a foreclosure and sale of the said mortgaged premises. The defendant further insists, that if he had not been prevented by the conduct of the complainant from preparing his said payment on the 1st of April, 1852, and if he had been ready to make such payment yet, that he was not bound to pay the one thousand dollars to complainant, without the production of the said bond and mortgage, in order that the said payment might be credited and endorsed thereon, and that the defendant might have some satisfactory evidence, that the said bond and mortgage had not been assigned by the complainant to some other person, or kept back, or concealed by him for some other purpose, or without some sufficient indemnity furnished to the defendant against the said bond and mortgage, and against all costs and damages.

The defendant offers now to pay the sum due, under the

order of the court, upon the production of the bond and mortgage, or upon the complainant's executing to him a sufficient indemnity.

To this answer, the complainant filed a replication on the 26th August, 1852, and proofs were taken.

D. Thomson, *J. Wilson*, for complainant.

Thomas N. McCarter, for defendants.

THE CHANCELLOR. It was unnecessary for the complainant to take issue upon the answer. The defence set up cannot deprive the complainant of the relief prayed for, nor is it of a character to throw the burthen of any costs upon the complainant. On the first of April, 1852, there was one thousand dollars due on the bond and mortgage. The first reason given, by the defendant, why he did not pay it, is, that a year before, in a conversation between the parties, the complainant told the defendant, that he did not wish him to pay any more of the principal, when the same became due; that all the complainant wanted was his interest; and that if the defendant paid the principal, he, the complainant, would be obliged to lend it out again, and he wished the defendant would keep the money and pay him interest therefor; that the defendant replied that he did not like to have the matter remaining in that situation, because, if he relied upon the complainant, and failed to raise the money when it became due, the complainant might then call upon him for it, and put him to great inconvenience to raise the same; whereupon complainant told defendant he need have no fears on that account, because, if he, the complainant, should happen to stand in need of the money when it became due, he would give timely notice, so that the defendant would be able to raise the same. The defendant says that he relied upon this promise, and as the complainant gave him no notice, it is inequitable, that the court should sustain these proceedings.

The promise amounts to nothing. It was without consideration, and was made in a manner, according to the defendant's

own statement, not to induce the defendant to rely upon it. Nor do I see, that under the circumstances, any moral delinquency can be fairly charged upon the complainant. When the money became due, the case was different. He had lost the evidence of his debt. He then told the defendant he required payment, and he waited upon him for nearly two months. Was not this timely notice?

Another ground of defence is, that the defendant was not bound to pay the money unless the complainant produced the bond and indorsed the payment on it, or gave the defendant a sufficient indemnity against the bond and mortgage; and that the court ought not to decree against him until the indemnity is given.

If the defendant was entitled to any indemnity before paying the money, he can derive no benefit from that fact in this suit, unless he shows he tendered himself ready to make the payment, and demanded such indemnity. But I do not think he was entitled to any indemnity. There is no reason to doubt the complainant's allegation, that the bond and mortgage had been surreptitiously taken out of his possession. The defendant did not doubt it. This he admits in his answer. Why was indemnity necessary? The receipt of the complainant for the thousand dollars, was good against all the world. It was as good a protection to the defendant as any security the complainant could give him. No matter what disposition the complainant had made, or might make of the bond and mortgage, such receipt would always be available as so much paid upon them.

Nor do I see any propriety now, in this court's compelling the complainant to indemnify the defendant before making a final decree in the cause. The decree of this court will protect the defendant against any other claims upon the bond and mortgage.

The complainant is entitled to a reference, and to a final decree, with costs, upon the coming in of the Master's report, stating the account, &c.

ISAAC VANDERVERE *v.* JOHN G. READING *et al.*

The court will not lend a willing ear to applications to permit answers to be amended, or to be taken from its files.

Where it is some mere matter of form sought to be corrected—a mistake apparent upon the face of the paper, which can be corrected without prejudice to the complainant, the objection is not so serious, and yet in such cases the court has always acted with commendable caution, never allowing it, except upon the condition that the defendant shall immediately, upon the corrections being made, reswear the answer; and it will never make such an order where the plaintiff can be at all prejudiced by it.

The court have, under some circumstances, allowed an answer to be amended in other respects than mere form. But no case can be found where a defendant has been permitted to take an answer absolutely off the file of the court; and to substitute another in its stead.

With regard to reforming answers, the practice now is, not to permit an amendment of the answer filed, but to allow the defendant, upon a special application, setting out particularly the amendment, to file a supplemental answer. The court has never gone further than to permit a defendant to correct or add some single fact which had been mistated or omitted, through mistake, fraud or accident.

Where the defendant comes before the court by petition, under oath, and states the particulars in which he wishes to amend his answer, and the reason for asking the indulgence; and the petition shews that the answer was false from beginning to end, not in one or two facts, but in every fact, without an exception material to the issue; some of the most important of which he had sworn to two months previous. And the reason for asking the indulgence of the court is that the answer was drawn up by the solicitor of the complainant, without the petitioner having any one else to consult and advise with, and because the solicitor assured him that it was all right, and that he did not know that the facts reflected upon his character, and he was assured by his solicitor that they did not. The court will not grant the prayer of the petition.

Sydney Reading, one of the defendants, presented a petition, praying that he might be permitted to withdraw or amend, as the court should deem proper, the answer filed by him in this suit.

A copy of the petition was served upon the complainant with notice of application. At the hearing it was offered on behalf of the complainant, to read affidavits in answer to the petition. This was objected to, as in violation of the rule requiring the affidavits to be taken on notice, or copie

served. The objection was sustained, and the application was heard upon the petition only.

James Wilson, for petitioner, in support of the application, cited—*Anonymous*, 1 *P. W.*, 300; *Southcot v. Watson*, 3 *Atk.*, 232; 2 *Danl. Ch. P.*, 981; *Alpha v. Payman*, 1 *Dick.*, 33; *Dagley v. Crump*, 1 *Dick.*, 35; *Jennings v. Morton College*, 8 *Ves.*, 79; *Wells v. Wood*, 10 *Ves.*, 401.

G. A. Allen and *J. F. Randolph*, contra.

THE CHANCELLOR. On the 18th day of November, 1852, Isaac Vandervere, the complainant obtained a judgment, in the supreme court, against Sydney Reading, one of the defendants, for about three hundred and twenty-eight dollars. Upon the judgment, execution was issued, and a levy made on certain real estate of the debtor. The real estate, so levied on, was incumbered to a large amount, and among other incumbrances, was a mortgage of two hundred dollars, and another of one thousand five hundred and forty dollars, given by Sydney Reading to John G. Reading. On the 13th day of May, 1851, Sydney confessed a judgment in the supreme court to John G. Reading, for the sum of one thousand nine hundred and eleven dollars. On the 10th of May, 1852, Sydney confessed another judgment, to John G. Reading, in the inferior court of common pleas of the county of Hunterdon, for the sum of one thousand six hundred and thirteen dollars and fifty-eight cents. By virtue of these several confessed judgments, levies were made by executions, on the same real estate, levied on, under the complainant's judgment.

On the 7th of December, 1852, the complainant exhibited his bill of complaint in this court. The bill charges the several judgments to John G. Reading to have been confessed and to be kept on foot, for the fraudulent purpose of defeating the lawful creditors of Sydney Reading, and particularly specifies the fraudulent manner in which they were contrived, and by which they have been managed, for the purpose of

accomplishing the alleged unlawful design of the parties thereto.

The bill is sworn to in the usual form by the complainant; that the facts, matters, and things, set forth in the bill, so far as they related to his own acts, are true, and so far as they relate to the acts and deeds of other persons, he believes them to be true.

To this bill is annexed the affidavit of Sydney Reading, one of the defendants, in which he swears specifically, to the truth of the allegations of the fraud charged in the bill, and to several particulars constituting the fraud, and stating the same minutely and at length. This affidavit was sworn to on the second day of December, 1852, and the bill was filed on the seventh. On filing the bill, an injunction was issued to prevent James G. Reading proceeding under his judgments and executions.

On the 6th of January following, John G. Reading filed his answer; and on the third of February, Sydney Reading filed his answer to the bill.

Sydney Reading answers the bill, very nearly, paragraph by paragraph. He admits every fact and circumstance, enlarging upon and explaining them with great particularity, which go to establish the frauds alleged in the bill. After the coming in of the answer, a motion was made to dissolve the injunction, which was refused. The cause was set down for hearing at the last term of this court; after which, Sydney Reading filed his petition, under oath, praying for leave to take his answer from the file, or that he may amend the same, as the court shall deem most proper, and also, that he may explain his affidavit annexed to the bill.

Let us examine as to what has been the practice of the court, and what is its policy, as to permitting answers to be amended, or to be taken from its file.

It is manifest, upon the slightest consideration, that as a matter of policy, the court ought not to lend a willing ear to such applications. Where it is some mere matter of form sought to be corrected—a mistake apparent upon the face of the paper, which can be corrected without prejudice to the

complainant, the objection to permitting the answer to be taken from the file, in order to correct such mistake, is not so serious; and yet in such cases, the court has always acted with commendable caution, never allowing it, except upon the condition that the defendant shall, immediately upon the correction being made, re-swear the answer; and it will never make such an order where the plaintiff can be at all prejudiced by it. 2 *Dan. Ch. P.*, 344. Where an answer is put in, so informal in its frame or form, or in the taking or filing it, that the complainant may treat it as a nullity, or take advantage of the irregularity, by moving to take it off the file, yet, in these cases, even the court will not permit the defendant to take the answer off the file, except for the purpose of correcting the mistake, and upon the condition above referred to.

As will be seen, upon reference to the authorities, the court have, under some circumstances, allowed an answer to be amended, in other respects than mere form. (*Burney v. Chambers*, *Bumb.*, 248; *Countess of Gainsborough v. Gifford*, 2 *P. Wms.* 424; *Griffiths v. Wood*, *Amb.* 62; *Patterson v. Slaughter*, *Amb.*, 292; *Wells v. Wood*, 10 *Ves.*, 401; *Chute v. Lady Dacre*, 1 *Eq. Ca.*, *Ab.*, 29; *Alpha v. Payman*, 1 *Dick.*, 33; *Dagley v. Crump*, 1 *Dick.*, 35). But no case can be found where a defendant has been permitted to take an answer absolutely off the file of the court, and to substitute another in its stead. With regard to re-forming answers, the practice now is, and it is the better practice, not to permit an amendment of the answer filed, but to allow the defendant, upon a special application setting out particularly the amendment, to file a supplement answer. (*Dolder v. Bank of England*, 10 *Ves.*, 284; *Jennings v. Morton Coll*, 8 *Ves.*, 79; *Wells v. Wood*, 10 *Ves.*, 401; *Jackson v. Parish*, 1 *Sim.*, 505; *Strange v. Collins*, 2 *V. and B.*, 163; *Taylor v. Obee*, *S. Pri.*, 83; *Ridley v. Obee*, *Wight*, 32; *Tidswell v. Bowyer*, 7 *Sim.*, 64; *Court v. Barr*, 2 *Mer.*, 57; *Nail v. Punter*, 4 *Sim.*, 474; *Curling v .Marquis of Townshend*, 19, *Ves.*, 628). The practice, of course, does not apply to correcting of matters purely of form. (*White v. Godbold*, 1

Mad., 269; *Peacock v. Duke of Bedford*, 1 *V. and B.*, 186; *Woodyer v. Crumpton*, 1 *Fowl., Ex. Pr.*, 379; *Ellis v. Saul*, 1 *Ans.*, 332: *Lord Moncarter v. Braithwate*, 1. *Younge*, 382).

There are, together with the cases cited, upwards of fifty authorities upon the matter of re-forming answers; and yet, it will be found, that the court has never been willing to go further, than to permit a defendant to correct, or add some single fact, which had been mistated, or omitted through mistake, fraud or accident. In a note to *Livesey v Wilson*, 1 *Ves. and Beam.*, 157, there is a summary of the grounds, with the authorities, upon which the court has extended this indulgence to defendants. First, in small and immaterial matters. Second, where a mistake had crept into the ingrossment. Third, where new matter has been discovered since the original answer was put in. Fourth, in cases of surprise. Fifth, in mistakes of names. But where the defendant mistook, first, the law, second, where the defendant had unintentionly perjured himself, and an indictment was suspended over him, and third, where from the circumstance, that at the time of the answer put in, the defendant had not set forth his defence, from an inability to state it with precision, the court has refused him the indulgence of amending.

In the case of *Livesey v. Wilson*, the defendant had misstated a fact, in reference to his possession of the property in question. On his affidavit, setting forth that the inaccuracy arose from his not before stating the fact to his solicitor; not conceiving it at all material, to be introduced into his answer; and that it was not omitted by design or intention, in any respect; but arose purely through ignorance. The Lord Chancellor said: I am unwilling to make such a precedent, and consider this motion of such importance, that I will not grant it, unless the defendant will tell me, on his oath, that, when he swore to his original answer, he meant to swear in the sense, which he now desires to be at liberty to swear to; if he did not, I will not suffer him to avail himself of the fact, as he now represents it. The court re-

quires, in making the application, the defendant should state specifically, what he wishes to put on the record, in order that it may judge how far his application is reasonable (*Curling v. Marquis of Townshend*, 19 *Ves.*, 628), and when it is new matter, sufficient reason must appear for not having it inserted in the original answer (*Tennant v. Wilsmore*, 2 *Ans.*, 362), and the defendant must confine himself strictly to the correction of the mistake sworn to (*Strange v. Collins*, 2 *V. and B.*, 163–167), and finally, the defendant must make such a case, that it shall appear to be due to general justice, to permit the case already on record, to be altered. (*Wells v. Wood*, 10 *Ves.*, 40).

All the English authorities will be found cited in (2 *D. C. P.*, 199). The American authorities on the point are few. The views of Justice Stag in the case of *Smith v. Balvcock, et al.*, 3 *Sumner*, 585, fully coincide with those expressed in the cases refered to. He remarks "it seems to me, that before any court of equity should allow such amended answers, it should be perfectly satisfied, that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence, and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to."

In the present case, the defendant comes before the court by petition, under oath, and states the particulars in which he wishes to amend his answer, and the reasons for asking the indulgence. The bill had charged, that two judgments confessed by him, were fraudulent. It set out a number of facts and circumstances going to establish the fraud. The answer of the petitioner admits the fraud, not in a general way, but in a most minute manner, and even to detailing circumstances, between himself and his co-defendant, going to establish the fraud. The petition shows, that the answer was false from beginning to end, not in one or two facts, but

in every fact, without an exception, material to the question in issue. Some of the most important of these facts, are the same he had sworn to, two months previous, and placed upon the file of this court, in the form of an affidavit annexed to the bill. His reasons for asking the indulgence of the court is, that the answer was drawn up by the solicitor of the complainant, without the petitioner's having any one else to consult and advise with, and because the solicitor assured him, that it was all right. How this can justify, or how excuse the petitioner, in swearing to a state of facts one month, and in a most deliberate manner, after they are incorporated in an answer, re-affirming them with more particularity, the next month, I cannot conceive. He does not pretend that the answer was not read to him, or that he did not understand every fact as it is set forth in the answer; but he says, that he did not know these facts reflected upon his character, and that he was assured by the solicitor that they did not. It amounts to this. He swore to the facts according to *advice* of counsel, and not according to his own *knowledge* of them. It is to be feared that this is too often the case. It is not so common to acknowledge it. In a case like this, it required no reference to authorities, to show that the court ought not to grant the prayer of the petition. I did not have the least doubt about the question when it was presented; and, therefore, it was without any reluctance, that I annulled the application, on behalf of the complainant, to read affidavits, in answer to the allegations contained in the petition. Having the case before me, I have taken the opportunity to examine, as to the practice of the court, in permitting amendments to pleadings. I have been very much struck with the great carelessness and negligence of very many answers, that I have been called upon to examine, and there is a looseness prevailing in this court on the draft of pleadings requiring to be sworn to, which ought not longer to be permitted, and which must, in some way be discountenanced by the court.

The rules in reference to amendment of pleadings, which have been put in under oath, may, at first view, appear too

stringent; but a little reflection will satisfy us of their propriety. It does not require a knowledge of the law, or of a parties' rights, to guard him against swearing to facts which are untrue. The facility with which affidavits are procured, and the readiness with which a party will swear to a statement of facts drawn up by counsel, are crying evils. How frequently does it happen, that a complainant, in order to obtain an injunction, is guilty of an omission, which changes altogether the equity of the case, and which he persuades himself, is less iniquitous and immoral than the actual statement of a fact which is untrue. Such a morality this court ought not to countenance; and I am sure, that counsel who practice in this court, would be unwilling to see it relaxing any of those wholesome rules, the object of which is to secure prudence and care in assuming the responsibility of an oath.

The prayer of the petition is denied with costs.

JACOB HINCHMAN v. ELLEN STILES *et al.*

A widow is entitled to her dower in an equity of redemption, and the court will protect her interest.

So where the sheriff sold under a decree of the court. The surplus, after satisfying the mortgages, represents the equity of redemption, and the widow of the mortgagor is entitled to her dower in it.

On the 5th of March, 1849, David Stiles executed a mortgage to B. F. Lippincott, on lot number one, to secure the payment of one hundred and forty-four dollars.

Subsequent to the execution of this mortgage, David Stiles intermarried with the defendant, Ellen Stiles.

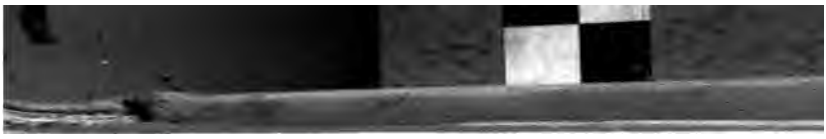
Subsequent to the marriage, to wit: on the 24th of April, 1849, David Stiles executed a mortgage to Rebecca Slim, on lot number two, to secure a debt of four hundred dollars.

On the 1st of April, 1850, David Stiles and Ellen, his wife, executed a mortgage on lot number one, and lot number two, to secure the payment of one thousand dollars to Jacob Hinchman, the complainant.

On this last mortgage the complainant filed his bill.

On the 14th of February, 1853, the master made a report, by which it appeared that, on that day, there was due on the Lippincott mortgage, one hundred and fifty-two dollars and thirteen cents; Rebecca Slim's mortgage, four hundred and nineteen dollars and forty cents; complainant's mortgage, one thousand and fifty-two dollars and thirty-four cents.

The sheriff sold, under the decree of the court, made at the last term of this court, (*See Hinchman v. Stiles et al*, 1 *Stn.* 361.) By the sheriff's certificate, it appears that lot number one sold for one thousand nine hundred and ten dollars, and that after paying the first and third mortgage, there is a surplus of five hundred and fifteen dollars and seventy-four cents. Lot number two sold for six hundred and five dollars.



The widow applies to the court, and asks that her dower-right in the surplus may be protected.

Mr, *Dudley*, for the widow.

Mr. *Teneyck*, for judgment creditors.

THE CHANCELLOR. The lot, embraced in the first and third mortgages, brought sufficient to pay off those incumbrances, leaving a surplus of five hundred and fifteen dollars and seventy-four cents. The second mortgage did not embrace this lot, and of course that mortgagee can have no claim upon this surplus. The question, as to its disposition, is between the widow of the mortgagor, and the judgment creditors. This surplus represents the value of the equity of redemption. When this case was before the court, at the last term, it was decided, that the widow was entitled to her dower in the equity of redemption, and that the court would protect her interest.

It is now insisted that the widow is entitled to the whole of the five hundred and fifteen dollars and seventy-four cents. This cannot be so. She is entitled to nothing more than her dower in the equity of redemption. The sum represents that equity of redemption. She is entitled to the interest on one-third of it, and no more. Suppose the sheriff had sold two-thirds of the lot, and paid off the incumbrance; it is very clear, that the widow would not have been entitled to the whole of the remaining one-third of the land as her dower. She would have been entitled to her dower, that is her thirds, in the land that remained unsold.

The widow's costs in this suit must be paid out of the surplus. Of the residue, two-thirds must be paid to the judgment creditors, according to their respective priority. One-third must be invested, under the direction of the court. The widow will be entitled to the interest during her lifetime, and at her death the judgment creditors will be entitled to the principal.

As to the proceeds of lot number two, two-thirds must be appropriated to pay the socond mortgagee her costs, and the



amount due on her mortgage. One-third must be invested under the direction of the court. The widow will be entitled to the interest during her life. At her death, the principal will go, first to make up any deficiency the second mortgagee may be entitled to, and the residue will belong to the judgment creditors.

JOHN CORYELL and others, Executors of JOHN HOLCOMB deceased *v.* The PRESIDENT and MANAGERS of the NEW HOPE DELAWARE BRIDGE COMPANY.

The object of the second section of the "act to prevent frauds by incorporated companies," was to prevent companies actually insolvent, or whose embarrassments were such as must inevitably lead to insolvency, from doing what it is lawful for an individual debtor to do—make a preferrence in favor of any creditor. It is the duty of the court to give such a construction and application to the act, as to effect the object the legislature had in view.

So where it appeared that several days prior to the execution of a mortgage, the company had refused to redeem its bills, and that the day after its execution the company was hopelessly insolvent. And that after the first act of insolvency, a portion of the directors had been called together for the very purpose of securing the debt due to the particular creditor, in contemplation of the insolvency of the company. The mortgage was held to be utterly null and void as against creditors, and in direct violation of the letter of the act.

A company cannot, on the eve of insolvency, transfer its property to secure certain favorite creditors, and *they* claim the benefit of the proviso of the second section of the act. This proviso was intended to protect a stranger, who, in good faith, and in total ignorance of the situation of the company, makes a purchase of its property, and pays down the consideration money.

Where the charter of a company required five managers to constitute a quorum, and there were but four present when a resolution was passed, authorizing the execution of a mortgage, the mortgage is null and void, from the fact that it never received the sanction of the board of directors.

By the seventeenth section of the act, it is enacted: "That in case any such company, or person or persons whatever, shall think themselves or himself aggrieved by the proceedings or determination of the said receiver or receivers, or trustees in the discharge of their duty, it shall be lawful for the party aggrieved to appeal to the Chancellor, who shall, in a summary way, hear and determine the matter complained of, and make such order touching the same, as shall be equitable and just." The Chancellor may ask the aid of a jury *under the general power of the court.* An issue may be directed if any matter of fact shall render the intervention of a jury necessary. But the effect of the verdict would be very different from that of a jury *under the thirteenth section of the act to prevent frauds by incorporated companies.* Under the last act the verdict would be conclusive, unless set aside by an order of the Supreme Court. If ordered by the Chancellor under the general power of the court, it would be to inform his conscience, and he would not be bound to respect it unless his judgment approved it.

But in such cases, the Chancellor will not ask the intervention of a jury, unless the case is made a very doubtful one by the evidence.

John Holcomb, as a mortgage creditor of the defendants, filed his bill against them, under the act entitled "An act to prevent frauds by incorporated companies." (*Statutes of N. J.* 129.) Such proceedings were thereupon had, that receivers were appointed. In adjudicating upon the claims of the creditors, the receivers determined that the complainants' mortgage was not entitled to priority. Upon the application of T. J. Coleman, as a creditor, the receivers issued a certificate to him for the sum of twenty-three thousand three hundred and seventy-one dollars. From these proceedings, and determination of the receivers on these several claims, the complainants appealed to the Chancellor.

W. Halsted and *O. S. Halsted*, for appellants.

J. W. Scudder, for Coleman and others, creditors.

THE CHANCELLOR. The receivers, by their report made to this court, bearing date the 25th day of April, 1853, among other things, reported "that the mortgage to John Holcomb, bearing date the 28th day of December, 1847, to secure the payment of fourteen thousand dollars, is not entitled to priority over other creditors; that the same was made and given after the defendants had stopped payment, or in immediate anticipation of insolvency." They further reported, that they issued a certificate to T. J. Coleman, upon a claim presented by him, for the sum of twenty-three thousand three hundred and seventy-one dollars. By virtue of the 17th section of the act, entitled "an act to prevent frauds by incorporated companies," the complainants have appealed from these determinations of the receivers.

First, as to the Holcomb mortgage. By the second section of the act referred to, it is enacted "that whenever an incorporated company shall become insolvent, or shall suspend the ordinary business of the said company, for want of funds to carry on the same, it shall not be lawful for the directors or managers of the said company, or for any officer or agent of the said company, to sell, convey, assign

transfer any of the estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements of the said company; nor shall it be lawful to make any such sale, conveyance, or assignment, or transfer, in contemplation of the insolvency of any such company, and every such sale, conveyance, assignment or transfer shall be utterly null and void as against creditors."

The object of this section of the act, was to prevent companies, actually insolvent, or whose embarrassments were such, as must inevitably lead to insolvency, from doing what it is lawful for an individual debtor to do—make a preference in favor of any one or more of its creditors. It is the duty of the court, therefore, to give such a construction and application to the act, as to effect the object the legislature had in view.

The money, which this mortgage was executed to secure, was loaned to the company in 1845. No evidence of the debt was given until the execution of the mortgage, on the 29th of December, 1847. Several days prior to this, the company had refused to redeem its bills through its usual agents in the city of New York.

It was on a bill filed by this mortgagee, that the company was declarad insolvent. In his bill, he alleges, that on the 30th day of December, the day after the mortgage was executed, the company was hopelessly insolvent; and it is proved, that after the act of insolvency committed in the city of New York, a portion of the directors were called together, in contemplation of the insolvency of the company for the very purpose of securing the debt due to this creditor. This mortgage was executed in direct violation of the letter of the act, and is, therefore, utterly null and void, as against creditors. If the mortgagee can come in as a creditor of the company, he cannot be admitted as a mortgage creditor; he must come in under his original debt, and in order to do that, must prove it.

But it was argued, that the mortgagee is entitled to the benefit of the *proviso* of the second section of the act, which is, "that in case of a *bona fide* purchase, made for a valuable

consideration, before the said company shall have actually suspended the ordinary business of the said company as aforesaid, by any person having no knowledge, information or notice of the insolvency of the said company, or of the sale being made in contemplation of the insolvency of the said company, such purchase shall not be invalidated or impeached."

Admitting that the refusal of the company to redeem its bills in the city of New York, was not an actual suspension of the ordinary business of the company, yet, the creditor is not entitled to the benefit of the proviso for several reasons.

He was not such a *bona fide* purchaser for a valuable consideration, as the act contemplates. A company cannot, on the eve of insolvency, transfer its property to secure certain favorite creditors, and they claim the benefit of this proviso on the ground that they had no knowledge, information, or notice of the insolvency of the company. If they could, the object of the act would be defeated. This proviso was intended to protect a stranger, who in good faith, and in total ignorance of the situation of the company, makes a purchase of its property, and pays down the consideration money. But all precedent creditors of the company must stand on the same footing. Such was the design of the act.

Nor did Mr. Holcomb stand in the position of a creditor having no notice of the insolvency of the company. He loaned this money to the bank, through Mr. Coryell, one of its directors. Mr. Coryell acted as his agent through the whole transaction; and while acting as such agent, it was through his instrumentality, that the directors were called together, to sanction the execution of the mortgage. Mr. Coryell attended to the execution of the mortgage, and it was delivered to him as the agent of Mr. Holcomb. Notice to Coryell was notice to Holcomb.

But again, this mortgage is null and void from the fact that it never received the sanction of the board of directors, or managers. By the charter of the company, five managers constitute a quorum. There were only four present

when the resolution was passed, authorizing the mortgage, and there is no evidence that any other manager gave his sanction, either formally, or otherwise, at any other time.

The counsel further relied upon an agreement alleged to have been made at the time the loan was originally advanced, that it should be secured by a mortgage. If such an agreement would help the complainants, yet, the proof in the case falls short of establishing such an agreement.

The report of the receivers, in respect to this mortgage, is erroneous in form. They should have declared the mortgage null and void, and allowed the creditor a certificate for his original debt. I presume they have done this in substance. Let this matter, however, be set right, in drawing up the order on this appeal.

The other matter of appeal, is as to the certificate which the receivers allowed to T. J. Coleman, for twenty-three thousand three hundred and seventy-one dollars.

Coleman presented to the receivers the bank bills of the company, of different denominations, amounting in all to twenty-three thousand three hundred and sevent-one dollars, together with his affidavit that he was the *bona fide* owner of the bills. On account of some supposed connection that Coleman had had with the agents of the bank in redeeming the bills, there was a suspicion that he did not come by the bills *bona fide;* and accordingly, there was an investigation had before the receivers. The complainants, as creditors to a large amount, being deeply interest, appeared before the receivers, by their counsel, in opposition to the claim. The bills being genuine, their production was *prima facia* evidence, that the bank was indebted, to the amount of such bills, to the holder. It was perfectly proper, that the receivers should impose terms on the holders of bills, that their presentation should be accompanied with an affidavit that they were received in a *bona fide* manner, and that the amount was justly due and owing. Coleman complied with the terms, and he was entitled to receive a certificate, unless his rightful claim to the bills could be impeached. This was

attempted to be done, by the examination of Coleman himself, as a witness, and of several other individuals.

Upon carefully examining the evidence, there is something to excite the suspicion that all of these bills did not come *bona fide* into the hands of Coleman; and I was, at first, disposed to take the verdict of a jury on the question. Further reflection has satisfied me, that I would not be justified in putting this expense on the creditors, and that it would not be dealing fairly with Coleman, under all the circumstances. Under the thirteenth section of the act, Coleman, when he laid his claim before the receivers, had a right to demand a trial by jury; and in like manner, the receivers might have required that his claim should be submitted to a jury. It does not appear that the complainants, or any other of the creditors, requested the receivers to submit the claim to a jury. It is true, the receivers would not have been bound to comply with the request; but in reference to a claim of the magnitude of this one, and about which there was so much dispute, the receivers would have listened with respect to any suggestion of the kind from the other creditors. By common consent, the investigation took place before the receivers. Coleman himself was called upon and underwent a long, searching examination. Several witnesses were examined on behalf of Coleman, and several in opposition to his claim. Counsel appeared on both sides. The receivers unanimously decided in favor of issuing the certificate. There was a suggestion as to the power of the Chancellor to ask the aid of a jury. By the seventeenth section of the act it is enacted: "That in case any such company, or person or persons whatever, shall think themselves or himself aggrieved by the proceedings or determination of the said receiver or receivers, or trustees, in the discharge of their duty, it shall be lawful for the party aggrieved to appeal to the Chancellor, who shall, in a summary way, hear and determine the matter complained of, and make such order touching the same as shall be equitable and just." This language would seem to imply that the Chancellor must himself decide the matter. And there is

some propriety in this; because, it is an *appeal to the Chancellor;* and because, the parties before the court, had the option of selecting a jury, and had declined doing so. In the same seventeenth section, however, and in connection with this right of appeal, the Chancellor, in the execution of the powers and authority under the act, is vested with all the jurisdiction and power which is lawful for the court of chancery to exercise in suits depending in that court, and to proceed according to the rules, principles and practice of that court, excepting when otherwise directed by the act. By the forty-fourth section of the act, regulating the practice in the court of chancery (*L. of N. J.*, 912), it is enacted: "That if any matter of fact shall render the intervention of a jury necessary, then the court of chancery is hereby authorized to direct an issue for the trial of the same in the supreme court." The effect of the verdict, by virtue of the general power of the court, would be very different from that of a jury under the thirteenth section of the act to prevent frauds by incorporated companies. Under the last act, the verdict would be conclusive, unless set aside by an order of the supreme court. If ordered by the Chancellor under the general power of the court, it would be to inform his concience, and he would not be bound to respect it, unless his judgment approved it. I think, therefore, that there is nothing in the act to prevent the Chancellor from directing an issue, whenever, in his opinion, any matter of fact shall render the intervention of a jury necessary.

But I do not think, that in a case coming before me as this does, I should ask the intervention of a jury, unless the case is made a very doubtful one by the evidence. I do not think this is so. At most, there is some suspicion thrown upon the claim, but nothing more. The proof was with those who opposed the claim, to show it ought not to be allowed; I am not dissatisfied with the conclusion the receivers arrived at. I do not think there was any evidence before them, that would have justified them in rejecting the claim.

It is unnecessary for me to determine whether the agree-

ment, made between the company and the Columbus Insurance Company, was illegal. Admitting it to have been so; still, the notes issued under it were good in the hands of *bona fide* holders. The question was, whether Coleman was a *bona fide* holder? He is to be considered such, until the contrary is proved.

The report of the receivers is affirmed, with the modification referred to as to that part of it relating to the Holcomb mortgage. Let the costs of the appeal come out of the general fund.

CHARLES E. YOUNG *et al. v.* LOUIS FRIER and ABRAHAM DUTTENHOEFFER, partners, &c., *et al.*

"If a creditor seeks the aid of this court against the real estate of his debtor, he must show a judgment at law creating a lien on such estate: and if he seeks aid in regard to the personal estate, he must show an *execution* giving him a legal preference or lien on the goods and chattels, which he has pursued to every available extent at law, before he can resort to equity for relief."

The exception to this rule recognized in *Blackwell et al. v. Rankin & Lee*, 3 *Hal. C. R.* 153, that this court will entertain a bill, by a creditor at large of a firm, to restrain an execution creditor of an individual member of the firm, from enforcing his legal remedy against the partnership property, is not sustained by the authorities. There can be no such exception to the rule. When the propriety of such an exception can be shown, it will reveal the injustice of the rule itself.

This was an application for an injunction, on bill, answer and affidavits.

Mr. *F. T. Frelinghuysen* and Mr. *Bradley* moved for an injunction upon the bill filed, and accompanying affidavits, and cited, (*Story on Partnership*, § 264; *Blackwell v. Rankin & Lee*, 2 *Hal. Ch. R.*, 160; *Moody v. A. & H. Payne*, 2 *J. C. R.*, 548; *Whitmore v. Roxborough*, 2 *Young and Collyer*, 13–21, *E. C. R.*; *Story's Eq. P.*, § 99.

Mr. *Zabriskie* read the answers of the defendants, and opposed the motion, and cited (*Mellville v. Brown*, 1 *Harr.*, 364; *Edgar v. Clevenger*, 1 *G. C. R.*, 258; *Story on P.*, § 264; *Ketchum v. Durkee, Hoff. C. R.*, 538; *Story Eq.* § 677–679; § 1253.

THE CHANCELLOR. The complainants who have exhibited this bill, are creditors at large, of the firm of Frier & Co. The defendants are the individual members of the firm, Isaac Duttenhoeffer, who is charged with having an interest in the partnership—and several judgment and execution creditors, who have levied upon all the personal property

belonging to the firm. The bill charges the judgments to be fraudulent. It prays that the sheriff may be enjoined from selling under the executions—that the several judgments may be decreed void—that the partners may deliver up all the assets of the firm, in order that the same may be applied, under the direction of this court, to the payment of the several debts due the complainants, and the claims of such other *bona fide* creditors of the firm as may apply to the court to be made parties to this bill, and contribute to the expenses of this suit—that an account may be taken and a receiver be appointed.

The defendants have, by their several answers, made the discovery which the bill calls for. But they insist, that the complainants have no right, by a bill in this court, to question the judgments, nor the disposition of the partnership property, because, as creditors at large, they have no standing in this court. The objection is well taken. The principle has always been recognized by the courts, both of law and equity, in this state.

In *Mellville v. Brown*, 1 *Harr. Rep.*, 364, and in *Edgar v. Clevenger*, 1 *G. C. R.*, 258, this doctrine was recognized, and acted upon, as laid down by Chancellor Kent, in 4 *J. C. R.*, 671. "If the creditor seeks the aid of this court, against the real estate of his debtor, he must show a judgment at law, creating a lien on such estate; and if he seeks aid in regard to the personal estate, he must show an *execution* giving him a legal preference or lien on the goods and chattles, which he has pursued to every available extent at law, before he can resort to equity for relief."

The counsel for the defendants admitted the rule as a general one, but insisted that they had brought themselves within an exception, recognized in *Blackwell et al. v. Rankin & Lee*, in 3 *Hal. C. R.*, 153. Andrew Rankin, of the firm of Rankin & Lee, had confessed a judgment to Elias Plum for his individual debt; and the other partner, George H. Lee, had confessed a judgment for his individual debt to Caroline Hayden. The case, as reported, states. "In this state of things, I. M. B., E. A. W. and W. C., part-

ners in trade, creditors of the firm of Rankin & Lee, who had commenced suit, but had not obtained judgment for their demand, exhibited their bill against Andrew Rankin and others, charging combination and confederacy to defraud the complainants and others, the *bona fide* creditors of the said firm of Rankin & Lee, and to take into their hands the whole of the property of the said firm; and that the said judgments were confessed fraudulently, and praying that they may be decreed to be void, &c.; and praying an injunction, restraining the sale." The injunction was allowed; and on a motion made without answer, to dissolve the injunction, it was refused. In that case, the Chancellor did decide that the creditors at large of a partnership, might file their bill in this court, and restrain an execution creditor of one of the members of the firm, from applying the partnership assets to the payment of his separate debt. He rests his decision upon what is said by Mr. Justice Story, in commenting upon the case of *Moody v. A. and H. Payne*, 2 *John. Ch. Rep.*, 588, *in* 1 *Story Eq.*, 678; 2 *Story Eq.*, § 1253, and upon the case of *Ketchum v. Durkee et al.*, 1 *Barb. C. R.*, 480; upon 1. *Mad. Ch.*, 136, and *Waters v. Taylor*, 2 *Ves. and B.*, 299.

I have examined, with great care, these references and some thirty others bearing upon the point in question. According to the best judgment I have been able to form, in examining these authorities, not one of them sustains the exception to the rule contended for. It is with great diffidence I dissent from a decision of my predecessor, who decided that case, and I should not feel at liberty to do so but for the fact of the great number and uniformity of the decisions, in opposition to the conclusion he reached.

Let us examine the authorities relied on by the Chancellor in *Blackwell et al. v. Rankin & Lee*, and see whether they have not been misapprehended. They do not sustain the doctrine contended for, that this court will entertain a bill, by a creditor at large of a firm, to restrain an execution creditor of an individual member of the firm, from enforcing his legal remedy against the partnership property.

In *Moody v. A. and H. Payne*, 2 *John. Chan. Rep.*, 548, one of the partners confessed a judgment for his separate debt, and by execution, had seized upon the partnership property. The bill was filed, *not by a creditor at large*, but by one of the *partners* for a partnership account. The question—whether a general creditor could maintain the bill—was in no way involved. There was no difficulty, as to the complainant's standing in the court. As a late partner he had an interest in the property as part owner—he had a *lien* on the goods, such as a general creditor has not. The Chancellor refused to enjoin the creditors upon other principles disclosed in his opinion. Justice Story in 1 *Story's Eq.*, § 678 (it is said by the Chancellor in 3 *H. C. Rep.*, 153), refers to this decision, and dissents from it. But from what does he dissent? Chancellor Kent had decided, that one of the partners could not restrain an execution creditor of an individual member of the firm, from selling the partnership property, to pay his individual debt. From that, Justice Story dissented. But while Justice Story says one of the partners may maintain such a bill, he no where intimates that a general creditor can do it.

It is true, as is stated in 2 *Story's Eq.*, § 1253, that a long series of authorities has established this equity of the joint creditors, to be worked out through the medium of the partners; that is to say, the partners have a right, *inter se*, to have the partnership property first applied to the discharge of the partnership debts, and no partner has a right except to his own share of the residue, and the joint creditors are, in case of insolvency, substituted in equity to the rights of the partners, as being the ultimate *cestui que trust*, of the fund to the extent of the joint debts. That the creditors, indeed, have no lien, but they have something approaching to a lien; that is, they have a right to sue at law, and by judgment and execution to obtain possession of the property; and in equity they have a right to follow it as a trust, into the possession of all persons who have not a superior title. But where, in this comment of the learned author, do we find his authority for saying, that a creditor at large may follow

the joint property, or has a right to appeal to the aid of a court of chancery, to have his equities adjusted. Of the numerous authorities referred to by Justice Story, to sustain the propositions he lays down, not one of them was a case where a creditor at large had asserted his rights. It appears to me very plain, that the author never meant to advance the proposition he is quoted as maintaining.

In *Waters v. Taylor*, 2 *Ves. and Beam.*, 299, the bill was filed by one partner against his co-partner, for a dissolution of the partnership, on account, &c. The Lord Chancellor gives no countenance to the principle contended for. In *Mad C.*, 136, the author says: "If an execution be issued on account of the separate debt of one partner against the partnership effects, *a bill may be filed by the solvent partner*, and for an injunction in the mean time."

In *Ketchum et al. v. Durkee et al.*, 1 *Barb. Ch. R.*, 480, the Chancellor says: "Upon the dissolution of a co-partnership by the death or bankruptcy of one, or both of the co-partners, the creditors of the firm obtain a *quasi* lien upon its property and effects, which the court of chancery may work out for them, in administering the equities between the co-partners or their representatives." But did the court attempt to work out for the creditors in that case their *quasi* lien, upon a bill filed by a creditor at large? The bill was filed by one of the partners, and thus the court obtained its jurisdiction.

But how can such an exception, as is contended for here, be maintained with any propriety?

The rule is admitted to be well settled, that a creditor at large, cannot, by bill in this court, question the disposition of his debtor's property, or interfere with a judgment creditor, even if the debtor and creditor are practicing the grossest fraud in disposing of the debtor's property. In *Wiggins & Boerum v. Armstrong et al.*, 2 *Joh. Ch. Rep.*, 144, it is said: "The reason of the rule seems to be, that until the creditor has established his title, he has no right to interfere, and it would lead to an unnecessary, and perhaps an oppressive interruption of the exercise of the

debtor's rights. Unless he has a certain claim upon the property of the debtor, he has no concern with his frauds."

If a creditor at large, is not permitted to ask the aid of this court, to restrain a judgment creditor of his debtor from disposing of his property when he charges the grossest fraud, and combination to cheat him, what propriety is there, in giving a creditor at large a standing here on the ground that the execution creditor is seizing upon partnership property, to pay an individual debt? Is it not much more reasonable to lend him the aid of this court in the former case, than in the latter? There certainly is no propriety in saying, the arm of the court is too short to aid you in detecting fraud, but can aid you, if you can show that the conduct of the persons, whose doings you impeach, may work injustice.

There can be no such exception to the rule. When the propriety of such an exception can be shown, it will reveal the injustice of the rule itself. A great deal was said on the argument, about the *quasi lien* of the creditors of a partnership on its property, as against creditors of individual members of the partnership; and in the case of *Blackwell*, the Chancellor says, it is this *quasi* lien which gives this court jurisdiction for the purpose of protecting the creditors of the partnership. But is any lien, which such creditors as have, against creditors of individual members of the partnership, any more sacred, or better entitled to the protection of the court, than the lien, or claim, or whatever you may please to call it, which any creditor has on the property of his debtor, as against a wrong-doer?

This bill cannot be maintained. The complainants are only creditors at large of the firm. They have no lien on the property in question. The injunction must be refused, and the bill dismissed with costs.

THE TRENTON WATER-POWER COMPANY v. ROBERT CHAMBERS.

One who had waived his right to have commissioners called, and permitted a corporation to take possession of his land without first making compensation, or pursuing the mode prescribed by the act to ascertain it; and permitted them to change the character of the property, expend large sums of money upon it, and constitute it a part of an extensive and valuable public improvement, cannot recover the possession of the land, upon paying for the improvements. The only relief the court will afford, is to give him compensation for his land, and remuneration for all damages; and this may be ascertained either by reference to a master, or the intervention of a jury.

C. S. Green and *W. L. Dayton*, for complainants.

M. Beasley, for defendant.

THE CHANCELLOR. The "Trenton Delaware Falls Company," was incorporated on the 16th of February, 1831. The company was authorized to erect a wing dam on the Delaware river, between the mouth of the Assanpink and the head of Wells' Falls, and a race-way in, along and near the bank of said river, in the neighborhood of Trenton, and to construct and make all such embankments, reservoirs, aqueducts, weirs, gates and other works as the managers of said company might deem convenient and necessary for the purposes aforesaid. The act prescribes the mode by which the company is to acquire the title to the land necessary for the works. Robert Chambers, the defendant, was the owner of a tract of land south of the Assanpink, and his brother, Reeder, of a tract in the same vicinity. The route of the main race-way, branches and improvements, have been completed at a very heavy cost. The works are of great public importance. A large number of factories and mills have been erected, depending for their maintenance upon this public improvement. The route of the race-way

was located according to law, and occupied a portion of the said lands of the defendant and his brother. In the construction of the works over the land of the defendant, a deviation was made in the route filed, by extending the east line of the race-way in such a manner as to make a reservoir upon the defendant's land.

In the year 1840, "The Trenton Delaware Falls Company" were decreed by the court of chancery to be insolvent, and the property and franchises of the company were sold by receivers appointed for the purpose. By virtue of an act of the legislature subsequently passed, the purchasers were authorized to hold the real estate, works and franchises so purchased, in the same manner that the original stockholders held the same; and by the said act it was also enacted, that the said company should thereafter be known as "The Trenton Water-Power Company." Under this name, the company have since enjoyed the works, and have expended large sums of money in their maintenance and further improvement. Since then the defendant has commenced two suits against the complainants, each of them in a plea of trespass on the case, and has declared against them for damages for the erection and construction of the said race-way by the "Trenton Delaware Falls Company" over and across his said lands, and for the continuing and maintenance of the said race-way by the complainants, and for causing the water drawn from the river Delaware, by means of the dams and works of the complainants, to flow through the said race-way over and across his said land.

Since the complainants have been in the possession of their works, the defendant has purchased of the heirs of his brother, now deceased, the other land mentioned over which the race-way was constructed, and to recover the possession of this land, has brought an action of ejectment.

The facts I have mentioned are admitted by the pleadings. The rights of the complainants under their purchase, or the validity of the acts of the legislature by which they were acquired, and were confirmed, are not questioned by the pleadings, and were not controverted on the argument.



The bill alleges, in substance, that the "Trenton Delaware Falls Company," after expending a large amount of money, became embarrassed for want of funds necessary to pay for the lands required to complete their works—that the defendant was a large stockholder, and anxious for their completion—that they applied to him for permission to occupy his lands, and construct their works thereon, deferring compensation to a future day, and that he consented; it charges that the work was done within sight of his residence, and went on, from day to day, without any objection from him; it charges, that if the defendant be permitted to obtain possession of the said lands, it will be in his power to obstruct the race-way, or draw off the water for the same, and thereby utterly destroy the value of the race-way, works and improvements, and also to stop the mill and manufactories now erected, to the irreparable injury and utter ruin of the complainants, and that he will refuse to sell the lands to them upon any terms.

The defendant admits, that he had a conversation with individuals named in the bill, about the company's taking his land—he says he did not consent, but does not say he positively refused—he does not deny that the race-way was commenced on his land, and its construction continued from day to day, with his knowledge, and without his objecting, but says, he did not know it was so constructed as to make a reservoir until the water was let into the race-way—he does not deny that it is his intention to draw off the water, and do the complainants all the injury they apprehend, but says, the injury is not irreparable, because they can acquire the title to the land for the race-way in the mode prescribed in their charter.

The complainants have proved that the defendant did give his consent for the construction of their works upon his land, and to wait to a future day for compensation, and that when he gave such consent he knew of the deviation in the line of the route.

The question is, can this court grant the complainants any, and if so, what relief? They are without remedy at

law, and if this court can afford them no protection, then this important public work is at the mercy of the defendant, unless, as the defendant sets up in his answer, the complainants can proceed and acquire the title to the land in the manner prescribed by the act of incorporation of the "Trenton Delaware Falls Company." But there are serious legal difficulties in the way of the complainants proceeding under the act. These difficulties, the counsel of the defendant did not deny to exist. If this court should now dismiss the bill on this ground, and a court of law should determine that the complainants cannot acquire title in the mode prescribed by the act, serious and irreparable mischief might ensue, before the complainants could again avail themselves of the protection of this court. I do not feel at liberty to deny the complainants the protection of the court on this ground.

Can the court protect the complainants? The defendant defends himself under his title, and he insists, that although he did consent that the complainants might take the land upon the terms alleged, yet it was a parol contract by which the complainants could acquire no title or interest in land; if a license, it was one revocable in its character, and he has revoked it.

I shall not stop to reconcile the numerous authorities upon the doctrine of license, to ascertain as to what extent they are revocable, or what peculiar relief a court of equity will afford, in mitigating the rigor of the common law. Nor will I trouble myself in determining whether relief can be granted in this case, under the head of specific performance. The case has its peculiarities, and I shall endeavor to determine it upon principles, right between man and man, such as commend themselves to our common sense and common honesty. If this can be done without violating any established rules of law or equity, it is better than to resort to any technical rules in bringing the case under any specific head of equity jurisdiction.

By law, the "Trenton Delaware Falls Company" had the right and power to take the defendant's land for the pur-



es of their works, the defendant had no option about the
ter, so far as to whether the company should, or should
have the land. All he could require was, that the com-
y, in obtaining the possession, should pursue the mode
scribed by their act of incorporation, in case a mutual
eement could not be made between them. In such case,
missioners were to be appointed, and upon their ap-
isement being made, and filed in the office of the Secre-
y of State, and payment of the sum awarded to the land
ner, the company had the right to enter upon and occupy
land. In this instance, the defendant waived his right
his mode of procedure, and consented that the company
ht take possession of his land, without first making com-
sation or pursuing the mode prescribed by the statute
scertain it. The only question between the parties was,
o the amount of compensation, not as to the right of the
pany's having the land.

The defendant delivered to the company the possession
the land, in order that they might change the character
the property, expend large sums of money upon it, and
stitute it a part of an extensive and valuable public im-
vement. He was interested as a stockholder in the suc-
s of the company's undertaking. The company completed
ir work, and third persons have made large investments
pending upon its maintenance. The defendant is now
ing advantage of his position, and has taken steps which
l put in jeopardy and destroy, not the complainants only,
the large interests depending upon them for success.
e complainants appeal to this court for protection.

n an ordinary case, the court would have no difficulty.
between individuals, if the court could not order a specific
formance, it might permit the defendant to take his land,
n paying for the improvements which he had induced to
made. *Parkhurst v. Van Cortlandt*, 1 *J. C. R.*, 287.

The court cannot do that in this case. There is only one
r to relieve the parties, and that is to give the defendant
mpensation for his land, and remuneration for all damages.
is court is perfectly competent to do this, and I do not

see any good reason why it should not afford such relief in this way. The defendant is entitled to nothing more, and it is unjust, and against good conscience, that he should be permitted, after having induced the expenditure of a large sum of money, to do that which can be of no benefit to himself, but irreparably injure others.

The counsel for the defendants insisted very strongly, that if the court should determine that the complainants could hold any of the land in question, upon making compensation, they should be confined within the limits of their survey, filed in the office of the Secretary of State.

This provision was made in part, and, perhaps, mostly for the benefit of the landholder, and he has a right, as far as he is interested, to waive its requirement. If the defendant had given the company a deed for this land, he could not object to their using it, because it is not all included in their survey. Having given his consent for its occupation and use, the fact of their being no survey, is no injury to him, and he cannot take advantage of it.

The question remains as to the mode of ascertaining the amount of compensation. The usual course is by reference to a master, but I have no difficulty in giving the defendant a jury, if he desires it. The statute provides: that if any matter of fact shall render the intervention of a jury necessary, then the Court of Chancery is authorized to direct an issue for the trial of the same in the Supreme Court. The facts, as to what is the value of the land in controversy, and what damages the defendant is entitled to, are questions peculiarly proper for that tribunal. They are, necessarily, matters depending upon the opinion of witnesses. A jury is the best tribunal to reconcile conflicting opinions, and put a proper estimate on their value, and it is the most satisfactory tribunal to parties.

I have more difficulty as to the land which the defendant purchased of the heirs of his brother. The question as to it, is presented in a very unsatisfactory manner by the plead ngs The bill alleges that the defendant has, since the completion of the said race-way, and since the complainants have be-

come the owners, purchased other lands of the heirs of his brother, by whose consent and permission the race-way was constructed over the same. The defendant admits, in his answer, the purchase of other lands, not of his brother, but of John H. Chambers and Francis P. Chambers, and avers that the land was taken possession of without their consent. It turns out, in evidence, that John H. Chambers, Francis P. Chambers, and one Mary Ann Chambers, are the heirs-at-law of Reeder Chambers, who is dead. It is proved that Reeder Chambers died in the early part of the winter of 1831, so that the race-way could not have been made during his life time. There is no evidence, as to whether these lands were occupied with the permission of any one.

This part of the case must be further examined, and I will hear the suggestion of counsel in reference to it.

The HUDSON MANUFACTURING COMPANY, Complainant, and PETER Z. ELMENDORF, Defendant.

A., assigned to B., a decree and all the rights, powers, and equities, appertaining to the same, as fully as they were possessed by himself, with authority to collect the same in his name, &c. B. agreed to pay, on the execution of the agreement, a specified portion, and the remainder in one year. For the purpose of securing the last payment it was agreed that A. should hold a lien upon the decree, as fully and as perfectly as though the same had not been assigned, and in the event of the non-payment of the said last mentioned sum, A. should have the power to proceed to collect the same upon the decree, giving B. thirty days notice; and if upon the sale, the premises should produce more than the last mentioned sum, such excess was to be paid over to B.

Held, that B. had no authority, under the agreement, to collect the money as the attorney of A., and discharge the decree.

The question involved in the controversy, turns upon the following agreement.

IN CHANCERY:	NEW JERSEY:
Between PETER Z. ELMENDORF, *Complainant.*	Somerset County.
and	GEO. H. BROWN, *Sol.*
ALBERT CAMMAN and JOHN B. CAMMAN, JOHN J. GASTON, JAMES NEVIUS, *Defendants.*	Decree perfected April 8th, 1841.

Whereas a decree has been regularly entered in the above entitled suit, and set forth in the *fi. fa.* now in the hands of the late sheriff, Peter A. Voorhees, Esq., and whereas there is now due upon the said *fi. fa.* and decree, the sum of six thousand two hundred and sixty-three dollars and sixty-eight cents, and whereas the sale of the premises, made pursuant to the said *fi. fa.*, and decree has been rendered null and void, leaving the decree in full force against the parties,



and in all respects as valid as though no such sale had been made.

Now, therefore, it is hereby agreed between the said Peter Z. Elmendorf of the one part, and the said Luther Loomis of the other part, that the said Elmendorf, in consideration of the sum above mentioned, to be paid by the said Loomis, as hereinafter mentioned, does hereby assign, set over, and transfer the said decree and all the rights, powers, and equities appertaining to the same, as fully as they are possessed by the said Elmendorf, to the said Loomis, to have and to hold the same, to his heirs and assigns forever, with authority to collect the same in the name of the said Elmendorf, or otherwise, as the said Loomis shall deem expedient. And the said Luther Loomis agrees to pay and does pay upon the execution of this agreement, the sum of three thousand one hundred and forty-one dollars and twenty-eight cents; and he further agrees to pay to the said Peter Z. Elmendorf, the sum of three thousand one hundred and twenty-two dollars and forty cents, in one year from the date hereof, and not before, with the lawful interest on the same.

And it is further agreed between the parties, that for the purpose of securing the payment of the last mentioned sum of money, the said Peter Z. Elmendorf shall hold a lien upon the decree hereby assigned to the said Luther Loomis, as fully and as perfectly as though the same had not been hereby assigned; and in the event of the non-payment of the said last mentioned sum and the interest, the said Elmendorf shall have the power to proceed to collect the same upon the decree, by selling the premises according to law, and as though no assignment had been made. But in the event of a sale, the said Elmendorf agrees to give the said Loomis, at least thirty days previous notice of such sale: and if, upon the sale, the said premises shall produce more than the said last mentioned sum of money and the interest, such excess or surplus, he agrees to pay over to the said Loomis, his heirs or assigns, provided the said surplus does not exceed the amount due upon the said decree, it being under-

stood that the whole amount is to be collected, if the property will produce the sum required.

And the said Elmendorf guarantees that there is now due upon the said decree, the sum of six thousand two hundred and sixty-three dollars and sixty-eight cents.

LUTHER LOOMIS, [L. s.]

PETER Z. ELMENDORF, [L. s.]

April 20, 1842.

On this agreement there are endorsed two payments for interest,—Feb. 8, 1851, one hundred and eighty-seven dollars and thirty-four cents—April 29, 1851, ninety-three dollars and sixty-seven cents, which was the interest up to the 20th of April, 1851.

In 1852, Elmendorf ordered the sheriff to sell under the execution.

This bill was filed to enjoin the sale. The bill alleges that the defendants in the execution, paid the amount due on it to Loomis, and insists that by the terms of the assignment, they were authorized in doing so; and they further allege that they have tendered to Elmendorf the amount due him, in gold and silver, which he refused to accept.

Elmendorf answered the bill. He insists, that if the company paid to Loomis the amount due to Elmendorf, they paid it in their own wrong, and without authority. He denies having received payment from Loomis or any one else. He admits the tender, but says, when it was made, it was required of him to transfer the decree, which he could not do without either the payment of the whole, or some authority for Loomis.

Sufficient of the case is stated above, to understand the points decided by the court.

The motion was to dissolve the injunction, which had been granted prohibiting the sale.

J. C. Elmendorf, *G. H. Brown*, for motion.

Jas. S. Nevius, *A. O. Zabriskie*, contra.

THE CHANCELLOR. The disposition of this motion depends upon the construction of the agreement between Peter Z. Elmendorf and Luther Loomis. If Loomis had authority, as is contended, to collect the money as the attorney of Elmendorf, and discharge the decree, then this injunction should be retained until the coming in of the answer of Loomis, and a further investigation of the merits. If it did not authorize Loomis to collect the amount that remained due to Elmendorf, then the injunction should be so modified as to allow Elmendorf to proceed under the decree, and collect that amount.

There was due on the decree the sum of six thousand two hundred and sixty-three dollars and sixty-eight cents. For, and in consideration of, the sum of three thousand one hundred and forty-one dollars and twenty-eight cents, the payment of which was acknowledged, and the further sum of three thousand one hundred and twenty-two dollars and forty cents which Loomis agreed to pay in one year, with interest, Elmendorf "did assign, set over, and transfer, the said decree, and all the rights, powers, and equities appertaining to the same, as fully as they are possessed by the said Elmendorf, to the said Loomis, to have and to hold the same to his heirs and assigns forever, *with authority to collect the same in the name of the said Elmendorf, or otherwise, as the said Loomis shall deem expedient.*"

If the assignment and agreement had stopped here, Loomis would have been authorized to enforce the payment of the whole amount due on the decree against the defendants. Of course it would have been authority for the defendants to settle with Loomis. But, by the further terms of the agreement, the authority conferred upon Loomis was limited. It was further agreed between the parties, "that for the purpose of securing the payment" of the amount remaining unpaid to Elmendorf, which Loomis had agreed to pay in one year, Elmendorf should hold a lien upon the decree "as fully and as perfectly as though the same had not been assigned." If this was not a limit to Loomis's authority, and a prohibition against his collecting that amount, how did Elmendorf

hold a lien for it upon the decree "as fully and as perfectly as though" the assignment had not been made? Elmendorf had Loomis's promise and agreement to pay the amount; but this was a further agreement between them, that Loomis's personal responsibility was not to be relied upon. And yet, if Loomis could discharge the lien, what security was the lien to Elmendorf? If a payment to Loomis was payment to Elmendorf, what did the agreement avail, that he was to retain the lien?

The Hudson Manufacturing Company had no authority, by virtue of the assignment, to pay to Loomis the amount due to Elmendorf. They claim relief on the ground that they have made payment to Loomis. This they were not justified in doing.

The injunction must be modified. Elmendorf must be permitted to proceed on his decree. The sheriff must pay to him the sum of three thousand one hundred and twenty-dollars and forty cents, with interest from the 20th of April, 1851, and bring the balance into court to abide its further order.

ELIAS C. VAN MATER v. WILLIAM SICKLER, ad. of ISAAC B. VAN MATER, dec'd.

In a suit instituted by one of the next of kin against an administrator, for a settlement of the estate in this court, all those entitled to a distributive share of the estate are necessary parties.

Where the complainant, as next of kin, calls upon the defendant, who is the personal representative of the intestate to answer in that capacity; and as an heir at law calls upon the defendant to account for the rents and profits, the bill is multifarious.

In the settlement of the estates of decedents, this court has concurrent jurisdiction with the Orphans' Court. But where jurisdiction has been assumed by the Orphans' Court, it is not the *right* of a party to change the form of settlement at his pleasure.

On filing the bill, an injunction was allowed by one of the injunction masters. This was a motion, on the answer of the defendant, to dissolve the injunction.

R. P. Thompson, attorney-general, for motion.

A. L. Eakin, contra.

THE CHANCELLOR. The complainant, as one of the next of kin of Isaac B. Van Mater, deceased, is entitled to a distributive share of his estate. He filed this bill against the defendant as the administrator of the intestate; and the prayer of the bill is that the defendant may be compelled to settle his accounts, as such administrator, in this court; that he may be decreed to account also for certain rents and profits which he has collected and which belong to the complainant as one of the heirs at law of the decedent. He further prays that the defendant, in the meantime, be enjoined from further prosecuting a suit at law, which the defendant, as administrator, brought against the complainant in the circuit court of the county of Salem.

The bill is objectionable in several particulars.

First. The necessary parties are not before the court. In a suit instituted by one of the next of kin against an administrator, for a settlement of the estate in this court, all those entitled to a distributive share of the estate are necessary parties. They are immediately interested in taking the accounts. Their rights are ascertained and concluded by the decree of this court.

Second. The bill is multifarious. One object of the bill is to settle the personal estate of Isaac B. Van Mater. The complainant, as next of kin, calls upon the defendant, who is the personal representative of the intestate, to answer in that capacity. But the complainant also, as an heir at law, calls upon the defendant to account for certain rents and profits which have come into his hands. It appears, from the bill, that the persons entitled to the rents, claim them as heirs at law, through their mother, who was the wife of the intestate. There are others than the heirs at law entitled to the rent, who, as next of kin, are interested in the distribution of the estate which the defendant represents. It is manifest, therefore, that these accounts cannot be settled in the same suit.

But as the bill might be amended to obviate these objections, it will, perhaps, be for the interest of the parties that I should express some opinion as to the merits of the case. The only question before me now is as to the dissolution of the injunction. This question, however, in a measure, involves the propriety of the court's assuming the jurisdiction of settling the estate of the intestate in this court.

The administrator has proceeded without any objection, in the orphans' court of the county of Salem, and presented there his accounts for final settlement. This complainant asked that court for time to file exceptions to the accounts, which was granted. Before the expiration of the time allowed for filing exceptions this bill was exhibited.

Two questions are presented:

First. Ought this court to assume jurisdiction for the purpose of administering the estate? If so, it might properly follow as incident that the injunction granted should be con-

tinued, for the reason that the settlement of the demand which the administrator has against the complainant would be involved in the final settlement and distribution of the estate by a decree of this court.

Second. Is the settlement of the account between the complainant and the estate of a character which requires or renders proper the interference of a court of equity? If so, it is proper this court should assume jurisdiction in order to grant the complainant relief. The settlement of the accounts of the administrator *here* would follow as incident to that relief.

In the settlement of the estates of decedents, this court has concurrent jurisdiction with the orphans' court. *Salter and others v. Williamson's ad.*, 1 *Green*, 480; *King v. Berry's ex'rs*, 2 *Green*, 44, 261; *manuscript of opinions of Ch. Williamson, Garrabrant Lawrence and Burtiss and others v. admr. of Hopkins.* But where jurisdiction has been assumed by the orphans' court, it is not the *right* of a party to change the forum of settlement at his pleasure. The Chancellor must exercise his discretion and judge as to the propriety of the court of chancery's interposing. There are many cases where the character of the estate is such that the remedy which can be afforded to parties interested, by the orphans' court, is defective. The case may be one of complication and difficulty, requiring the aid of a court of chancery, in ascertaining and securing the rights of those interested in the estate, and in the protection of the executor or administrator.

In this case, there is nothing which requires the aid of this court. The complainant alleges that the inventory filed is not a true one, and that the final account presented for allowance by the administrator, is in many respects inaccurate and erroneous. The orphans' court is as competent to adjust and correct these defects, if they really exist, as this court. There is no complaint of any error they have committed, nor is any reason suggested for any well grounded apprehension that that court will not afford complete justice. I do not see any reasonable ground, therefore, for ousting



the orphans' court of its jurisdiction, for the mere purpose of settling the administrator's accounts here.

As to the other ground, whether the complainant has any equity which renders the interference of the court, on his behalf, necessary or proper. The complainant is indebted to the administrator between one and two hundred dollars, for articles purchased at the vendue. After time was granted to file exceptions to the administrator's accounts, the administrator brought the suit at law against the complainant. There is no dispute that the debt is due, but the allegation is that the amount which the complainant is entitled to receive, as his distributive share of the estate, is more than the debt which the administrator claims to be due the estate; and it is insisted, that such being the case, it is unreasonable and inequitable that the defendant should be permitted to enforce the payment by suit at law. The answer denies the allegation that the amount due the complainant, as next of kin, is equal to the amount of the debt contracted. Ought the court to take jurisdiction of the case to settle this question? The delay in the settlement of the estate, and the expense of litigation, are proper matters for the consideration of the court. At the worst, the complainant will only be put to some inconvenience, by the course pursued by the administrator, in compelling him to pay his debt, if this court refuses to interfere. On the other hand, the whole amount in dispute will not pay the costs of this litigation. I do not think a suit like this is to be encouraged. I can only judge of the case as it appears by the bill and answer. The injunction must be dissolved with costs.

HENRY V. BUTLER and ROBERT L. TAYLOR *v.* THOMAS ROGERS AND OTHERS.

As a general rule, the court ought not to interfere in cases of nuisance, where the injury apprehended is of a character to justify conflicting opinions, whether the injury will in fact ever be realized.

It is not for this court to determine whether there has been any irregularity in laying out a street. Such proceedings must stand until set aside by a legal tribunal which has authority to interfere.

This was a motion for injunction, argued at Newark, August 2d, 1853. The case as made by the pleadings and proofs, sufficiently appear in the opinion of the Chancellor.

A. S. Pennington and *W. Pennington* for the motion.

John Hopper and *J. P. Bradley*, contra.

THE CHANCELLOR. The defendants deny that the erection of the blacksmith shop as contemplated by them, will be injurious to the complainant's business. They admit that they intend to erect the shop with the ordinary chimneys. They insist, that *such* chimneys are more convenient for themselves, and are less objectionable to their neighbors, on account of the dust, cinders, and soot, than the high chimneys. The only complaint in the bill is, that the dust, cinders, and soot, from the low chimneys, with a northerly wind, would be thrown into the paper mill, endanger the mill by reason of the sparks, rendering it uncomfortable to the workmen, and blacken and spot the pulp before it is made into paper. The complainants insist, that a blacksmith's shop constructed in any manner, located as this will be, will be a nuisance to them, and should be prohibited. But they ask, in case the court should not be willing to prohibit the erection altogether, that such restrictions may be put upon the de-

fendants, as to compel them to construct their forges with one large chimney.

In the case of *Rogers et al. v. Danforth et. al.*, decided in February term last, (*Stn. R., p.* 289) the complainants, who were the owners of a cotton mill, filed their bill to enjoin the defendants from erecting, within fifty feet of their mill, a large blacksmith shop with a number of forges, alleging it would be a nuisance and would destroy the complainants business. The defendants, in that case, put themselves upon the ground, that they intended to erect their shop with one large chimney, which would be the reservoir for all their fires and forges; that this was the modern improved plan, and that with such a chimney the injurious consequences apprehended would be avoided. There was much evidence in that case, and it was such as induced me, without any hesitation, to refuse the injunction, on the ground, that the evidence satisfied me, that the high chimney would avoid the mischief apprehended.

In the case now before me, a large number of witnesses have been examined, as to the comparative advantages of the high and low chimneys, and I must confess, the weight of the evidence is very strongly in favor of the latter. The manner in which this subject has been presented to me in these two cases, warns me of the very great caution to be observed in granting injunctions in cases of mere apprehended mischief, and where there is room for such contrariety of opinion.

These defendants have been carrying on, for the last twenty years, a large manufacturing establishment. In the enlargement of their works, the erection of an additional blacksmith's shop has become necessary. The place where they contemplate erecting it, is not only convenient, but it is the only lot they allege, that they own in the vicinity suitable for the purpose. To prohibit its erection altogether would be a serious damage to them. For the court to undertake to decide, that they should erect their works in any particular manner, when there is much conflicting testimon

whether such is the best mode of erecting them, is assuming an unnecessary responsibility.

The defendants were carrying on their business, where they now are, when the complainants became the proprietors of their mill. The business of the defendants was such as to require forges. In enlarging their works, they ought so to erect them, as to do no unnecessary injury to the complainants. The defendants insist they will do the complainants no injury; and they produce before the court, the testimony of a large number of witnesses, to show that the apprehensions of the complainants are not well founded. If the evidence before me can be relied upon, the blacksmith's shop will not be a nuisance. If the evidence were balanced, I should not feel justified in interfering. But it very strongly preponderates in favor of the defendants answer. Should, however, the consequences follow, which the complainants apprehend, there is no suggestion in the bill, that the defendants are not able to meet any demand, that may be made upon them in a legal way, for damages. As a general rule, the court ought not to interfere in cases of nuisance, where the injury apprehended is of a character to justify conflicting opinions—whether the injury will, in fact, ever be realized.

As a ground for relief, the complainants allege that "the society for establishing useful manufactures" were originally the proprietors of all the water power at Paterson, and have, from time to time, leased or sold mill lots with water power, to divers grantees and lessees, and had at the date of their lease to the complainants, in all cases as far as the complainants know and believe, covenants inserted in all their leases and grants, calculated to protect the other lessees and grantees from nuisances, and among other clauses inserted covenants restraining their lessees and grantees from erecting forges or furnaces; and that such provision was incorporated in their lease. and that they understood and took their said lease upon the express understanding that such provision was, and would thereafter be incorporated in all the leases and deeds of said society for mill lots. and that



the mill lot upon which the blacksmith's shop is to be erected was, at the date of their lease, leased to one Walker by the said society, and that there was a provision inserted in the lease to Walker, that no forge or furnace should be erected on said lot.

The counsel for the complainants did not argue that they could ask the court to interfere, by virtue of the covenant referred to. They insisted it was entitled to the consideration of the court, in viewing the subject upon its general merits. If true that such a covenant was inserted in all the leases, and if the lessees in observance of it, had erected their works, and if the complainants and defendants, with a mutual understanding that they would regard such covenant, had enlarged and carried on their business, although the one party might have no legal claim against the other, through or upon the covenant, it might have weight with this court on a question for injunction, if in other respects the right of the complainants to an injunction was doubtful.

The defendants deny that any covenants of the force and effect stated by the bill were inserted in the leases, and they allege that the Walker lot, on which they propose building, has, since the year 1841, been leased to several tenants without any restriction whatever. They set up in their answer, and they show by evidence, that they have had within one hundred and fifty feet of the complainants mill, ever since its erection, a blacksmith's shop, and that the complainants themselves have had, and now have, within one hundred feet of their mill a blacksmith's shop of their own.

Under such circumstances, I do not see that the complainants can claim any benefit from the covenants, even if they were of the character alleged in the bill.

There is another ground upon which the court is asked to interfere. It is alleged that the defendants are erecting their shop on a public street, and that by so doing they are bringing their building nearer to the complainants' mill than they have any right. In answer to this allegation, the defendants say that the street was laid out by the public authority of the city of Paterson, and they produce the record.

The complainants reply that the street was irregularly laid out, and that it was done without first vacating the old road. It is not for this court to determine whether there has been any irregularity in laying out the street. The proceedings were by a competent authority, and will stand until set aside by a higher legal tribunal, who has authority to interfere.

The motion for injunction is denied, with costs.

OBADIAH HERBERT v. REBECCA SCOFIELD AND OTHERS.

The acknowledgment of the receipt of the consideration money in a deed is *prima facie* evidence that the consideration is paid. But it is not conclusive. The grantor may show that the consideration was other than a moneyed consideration, or if a moneyed consideration, that in whole or in part it was unpaid.

The acknowledgment of payment in a deed is a receipt for the consideration money, and if the grantor impeaches that receipt it must be clearly made out to the satisfaction of the tribunal to which an appeal is made for redress.

Where a complainant comes into court with a sworn bill, and it turns out upon investigation of the case that the bill has been framed with skill and care to avoid an impression which would be made by an ingenuous statement of the case, the complainant assumes a position in the court which deprives him of the benefit of doubts which might otherwise be resolved in his favor.

A disingenuous bill which is sworn to, is quite as obnoxious to the censure of the court as a disingenuous answer.

On bill and cross bill.

Mr. *J. Vandyke*, for Obadiah Herbert, complainant in original bill.

Mr. *J. Scudder*, for Rebecca Scofield, complainant in cross bill.

Mr. *W. Halsted*, for Hiram S. Parsons.

THE CHANCELLOR. Obadiah Herbert filed his bill on a mortgage which had been executed to him by Rebecca Scofield. There is no dispute as to the rights of the complainant in the original bill. The controversy is between Rebecca Scofield and Hiram S. Parsons, under the cross bill.

The case made by the cross bill is this: That on the 30th of May, 1842, Obadiah Herbert, to secure a debt of $2,000, which he owed Jane Kirkpatrick, executed to her his bond, and mortgaged the lands in controversy.

On the first of August, 1842, Herbert conveyed the

mortgaged premises to Josiah Bennet. On the 11th of December, 1843, Josiah Bennet conveyed to Jacob C. Bennet, and on the 12th of April, 1848, Jacob C. Bennet conveyed to Rebecca Scofield.

The consideration of the conveyance to Rebecca Scofield was $3,000. She paid one thousand dollars down. By an agreement entered into between herself, her grantor, and Obadiah Herbert, she gave her bond to Obadiah Herbert in the penal sum of $4,000, conditioned to pay to Jane Kirkpatrick the said bond, to secure $2,000 which she held against Obadiah Herbert.

On the 5th of April, 1849, Rebecca Scofield conveyed part of the lands to Hiram S. Parsons for the consideration of $2,500. The cross bill alleges that $1,500 of this consideration money was paid in cash, at the time of the delivery of the deed, and that the balance, which was $1,000, Hiram S. Parsons agreed to pay to Obadiah Herbert, in satisfaction of so much of the Jane Kirkpatrick bond and mortgage, and that he has not paid the thousand dollars, and refuses to do so.

The cross bill prays that Rebecca Scofield may be decreed to have a lien on that part of the premises held by Hiram S. Parsons, for the thousand dollars, as the balance of the purchase money due her, and that it may be first sold to raise the money necessary to pay off the bond and mortgage of Obadiah Herbert.

There is no difficulty as to the law applicable to the case. If one thousand dollars of the purchase money agreed to be paid by Hiram S. Parsons remains unpaid, Rebecca Scofield has an equitable lien upon the premises for the money. *Sugden*, 352–353; *Chapman v. Tanner*, 1 *Vern.* 267; *Pollexfen v. Moore*, 5 *Atk.*, 272; *Story Eq. P.* §1217, *and note* (4); *Warner v. Van Alstyne*, 3 *Paige*, 515; 7 *Wheaton*, 46.

The deed expresses the consideration to be twenty-five hundred dollars in money, the receipt of which is thereby acknowledged. This is *prima facia* evidence that the consideration money was paid. But it is not conclusive. The grantor may show that the consideration was other than a

moneyed consideration, or if a moneyed consideration, that in whole or in part it is unpaid. As to the extent a party may go in impeaching the consideration, the cases are conflicting, but thus far, I think it is settled by the weight of authorities. *McCrea v. Purmort*, 16 *Wend.*, 460; *Wilkinson v. Scott*, 17 *Mass.* 249, and cases there cited.

The acknowledgment of payment in the deed is a receipt for the consideration money, and if the grantee impeaches that receipt, it must be clearly made out to the satisfaction of the tribunal to which an appeal is made for redress.

The allegation of the complainant in the cross bill is that the consideration was $2,500, as expressed in the deed—that $1,500 was paid in cash, and the balance of one thousand dollars Hiram S. Parsons agreed to pay to Obadiah Herbert, on a bond and mortgage of two thousand dollars which he held against the complainant. The defendant denies he made any such agreement, and the complainant has not made it out satisfactorily by proof. As evidence of the agreement, the bill charges that Hiram S. Parsons made one payment of interest on the one thousand dollars to Herbert, and that he offered to pay him the principal. This the answer denies. The testimony of Herbert would seem to sustain these allegations of the bill. But the witness does not speak with much certainty, and the explanations made by Charles B. Parsons, a witness on the part of the defendant, impairs very much the force of Herbert's evidence, Charles B. Parsons says his father lent the money to Chauncy Parsons to pay the interest. Herbert says both Hiram S. Parsons and complainant were there—that the interest was paid on the $2,000—he cannot tell who paid it, but he understood the interest was paid between them. As to the offer to pay one half the bond, Herbert does not fix with certainty the *time* when the offer was made. In explanation of this circumstance, Charles B. Parsons, while he also proves that the offer was made, makes it to have been before the deed was delivered, and before the settlement as to the consideration.

But still, although the complainant does not show tha

one thousand dollars was, by agreement, to be paid on the Herbert mortgage, if the proof was satisfactory that any certain portion of the purchase money remained unpaid, it would be an equitable lien on the premises, and the complainant would be entitled to relief.

But the proof must be satisfactory. If it leaves the matter doubtful, the acknowledgment in the deed is a protection to the grantee.

I must confess, the pleadings and the evidence, leave it very doublful whether all the purchase money has been paid. The conviction produced upon my mind is, rather that it has not all been paid. And yet, I do not see my way clear to afford the complainant any relief. He does not make out a clear case, and no one can say, with any certainty, as to the amount, if any, remaining unpaid.

The case is embarrassed by the bill. It is an injunction bill, and is sworn to. The complainant should have stated her case with accuracy. She has not done so. Where a complainant comes into court with a sworn bill, and it turns out, upon investigation of the case, that the bill has been framed with skill and care, to avoid an impression which would be made, by an ingenuous statement of the case, the complainant assumes a position in the court, which deprives him of the benefit of doubts, which might otherwise be resolved in his favor. A disingenuous bill which is sworn to, is quite as obnoxious to the censure of the court, as a disingenuous answer.

It is manifest, that the impression intended to be made by the bill was, that at, or about the time of the execution of the deed, the sum of fifteen hundred dollars was paid in cash, and at the same time, the understanding had, as to the manner in which the balance was to be paid. The answer denies this was so, and a careful examination of the bill will show that this denial may be reconciled with the statements of the bill in this particular.

The bill states, that Parsons agreed to pay the complainant for the premises, the sum of two thousand five hundred dollars. That the sum of one thousand five hundred dollars,

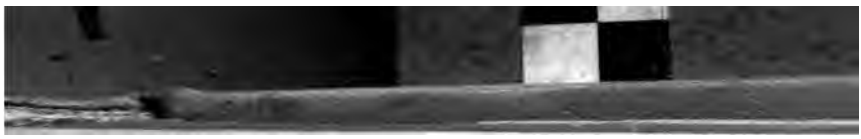
it was agreed, should be paid in cash, and the balance applied on the Herbert mortgage. Then, in a subsequent part of the bill it is stated, "that the said deed was received by the said Hiram S. Parsons, upon the terms and conditions last aforesaid." And again, "that the said Hiram S. Parsons, at, or about the time he received the deed, paid to the complainant the sum of one thousand five hundred dollars, as he agreed to do as before stated."

The defendant, by his answer, alleges, that he paid of the consideration money, two thousand dollars, by giving credit for that sum, to Chauncey Parsons, the son-in-law of the complainant; and that he paid the balance of five hundred dollars at a future day. I am well satisfied from the whole case, that neither the statement of the bill, or the answer, is to be relied upon, as to this part of the transaction. The defendant has shown, by every witness he examined, that very little, if any reliance, is to be placed upon his answer.

As the defendant admits, that at the time the deed was delivered, there was five hundred dollars of the consideration unpaid; and has thereby shown, that although the acknowledgment in the deed is for two thousand five hundred dollars, only two thousand dollars was actually paid. I shoud have been inclined, to have declared the five hundred dollars a lien on the premises, was I not satisfied of the want of ingenuousness in the complainant, in presenting her case in her bill.

As to her holding the property, to protect it from Chauncey Parson's creditors, I think nothing of that. There is no evidence to warrant the charge. But it is very plain, from the whole case, that the arrangement for the payment of the consideration money, was not as stated in the bill, and that Chauncey Parsons had some connection with this part of the transaction, which the complainant, for some reason, has suppressed.

There is a mystery in the matter which I cannot unravel. My conclusion is, the complainant has not proved her case. I feel justified, however, in dismissing the cross bill without costs.



The complainant, in the original bill, must take a decree for a sale of the mortgaged premises—to sell, first, the part owned by Rebecca Scofield, and to raise any balance out of the part owned by Hiram S. Parsons; but no other costs than those of the complainant, Obadiah Herbert, to be raised out of the mortgaged premises.

The NEW ENGLAND MANUFACTURING COMPANY *v.* FREDERICK A. VANDYKE, Jr., *et al.*

Subscribers to the stock of a manufacturing company put in at a valuation as assets of the company, a cotton mill, &c., receive the stock of the company therefor, and dispose of the same as their own. The company take possession of the mill and use it for several years; no conveyance by deed is made to them—a mere memorandum of the transaction being made on the journal of the treasurer.

Held that when the consideration for the property was received, its former owners became mere trustees of the company, and held the title for the company. Any conveyance made by them subsequent to that transaction, though for a full consideration to a grantee with notice, would be void against the company.

A judgment creditor at best stands in no better situation than such a grantee.

Although books of a company are not evidence against third persons, a memorandum in writing made by an agent of the parties and at their request, is evidence for and against them, and for and against all persons claiming under them.

C. S. Green, P. D. Vroom, for complainants.

W. Halsted, for defendants.

THE CHANCELLOR. David S. Brown and William R. Hanson were seized in fee, in their own right, of a certain mill site, together with a cotton mill erected thereon, and the machinery and fixtures necessary for the use of the mill. "The New England Manufacturing Company, of South Trenton," was incorporated by an act of the legislature of this state, on the fourth of March, 1842. Their capital stock consisted of one hundred and twenty-eight shares of five hundred dollars each. Brown and Hanson each subscribed for sixty-two shares of the stock, the par value of which was sixty-two thousand dollars. To pay for this stock they put in as assets of the company the said cotton mill, machinery, &c., at the valuation of sixty-two thousand dollars. This was the manner in which the company was organized. Brow

and Hanson took and disposed of the stock as their own. Directors were appointed. The company took possession of the mill and its appurtenances and carried on business for several years. No conveyance by deed was made to the company for the property which represented the stock. A mere entry, or memorandum, of the transaction was made by the book-keeper, in a book of the company called the journal of the treasurer's book, and also in the book of minutes.

On the seventh day of February, 1851, Frederick A. Vandyke, Jr., one of the defendants, recovered a judgment in the Supreme Court against William R. Hanson, the other defendant, and one Albert F. Hanson, for a large sum of money, upon which judgment an execution was issued and placed in the hands of the sheriff, with orders to levy upon and sell all the right and interest of Hanson in the said mill and premises. Upon the sheriff's advertising the property under the execution, the complainants exhibited their bill. They pray that Hanson may be decreed to make and execute, and procure to be made and executed to them a deed of conveyance for all his right, title, and interest in the said property—that he be restrained from conveying, mortgaging and encumbering it—that Vandyke and the sheriff be restrained from further proceeding under the judgment and execution, and that the complainants may have such other relief as may be necessary.

Vandyke does not stand in a position to defend himself, upon the ground that he is a *bona fide* judgment creditor without notice. It is therefore unnecessary to consider whether such a plea would avail him in this case. He and Hanson have each of them put in an answer to the bill. Both answers admit, substantially, the important facts which must control the decision of the case. It is evident, from their answers, that Vandyke, long before he recovered his judgment, knew of the transaction between Brown, Hanson, and the Company. He supposed, that in pursuance of the understanding between the parties, the property had actually been transferred by deed to the company. Before he recovered his judgment, he filed a bill of complaint in this court, under

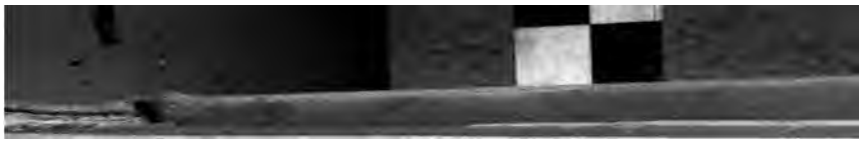


oath, in which he alleged that such conveyance had been made. He discovered that he was mistaken as to that fact, and then attempted to reach the property by means of a judgment against Hanson. He now insists he is not chargeable with notice, because the information he had was erroneous. It was that the legal title was in the company, when, in point of fact, it was in Brown and Hanson. The point is, did he know that the company had paid Brown and Hanson a full consideration for this property. It is evident that he did from his own answer. But his counsel insisted in argument that by the stock transaction between Brown, Hanson, and the company, the company acquired no interest in the property.

It is shown by the books of the company, that Brown and Hanson received one hundred and twenty-four shares of stock between them, and that they received it as the consideration for the mill and appurtenances. It is objected that the books of the company are not evidence against third persons. Admitting the position in all its extent, the evidence is not admitted as the books of the company. It was a memorandum in writing made by an agent of the parties, and at their request, and in that view, it is evidence for and against them, and for and against all persons claiming under them. Brown and Hanson disposed of their stock, and never paid for it in any other way; and the stock thus received by Hanson, Vandyke now holds and claims as his own. The company took possession of the mill, repaired it, and paid the taxes, and used it as their own. It was through mere carelessness that the deed was not executed.

When Brown and Hanson received the stock as consideration for the property under the agreement, they became mere trustees of the company and held the title for the company. Any conveyance made by them subsequent to that transaction, though for a full consideration to a grantee with notice, would be void against the company. A judgment creditor, at best, stands in no better situation than such a grantee. Such is the position of the complainant.

The legal title to the property is in Brown and Hanson.



The complainants have a right to call upon them for a conveyance. It is proper that the court should interfere and prevent the further embarrassment of the title by proceedings under the judgment. But a final decree cannot now be made. David S. Brown is a necessary party to the suit. There are many obvious reasons why the court ought not to decree a conveyance by one of these trustees without having the other before it. The reason given by the bill for not bringing Brown in, that Brown is willing to convey, is not sufficient. I cannot take the mere allegation of the complainants for the truth. When brought before the court, Brown may repent of his willingness, and may give good reasons why the complainants shoud not have the title which is in his co-trustee, until the accounts between them are settled.

The complainants are at liberty to amend their bill without costs.







REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF ERRORS AND APPEALS,

OF THE

STATE OF NEW JERSEY,

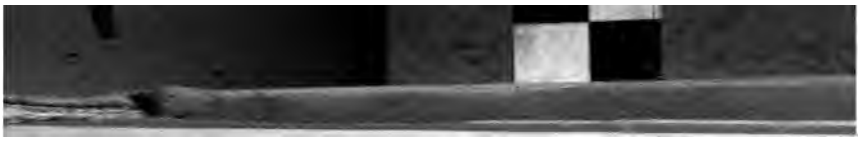
ON APPEAL FROM THE COURT OF CHANCERY,

COMMENCING WITH MARCH TERM, 1853.

JOHN P. STOCKTON, Reporter.

TRENTON:
PRINTED AT THE "TRUE AMERICAN OFFICE."

1856.



THE JUDGES OF THE COURT OF ERRORS AND APPEALS DURING THE PERIOD OF THESE REPORTS, WERE—

Hon. Benjamin Williamson, *Chancellor.*
" Henry W. Green, *Ch. J. of the Supreme Court.*

" Daniel Haines,
" Elias B. D. Ogden,
" Stacy G. Potts,
" L. Q. C. Elmer,
} *Associate Justices of the Supreme Court.*

John Huyler,
Thomas Arrowsmith,
Joseph L. Risley,
Moses Wills,
John M. Cornelison,
Caleb H. Valentine,
} *Appointed Judges of this Court.*

By an act entitled "An Act to Reorganize the Courts of Law," passed February 9, 1855, the Associate Justices of the Supreme Court were increased to six, and the Hon. Martin Ryerson and Peter Vredenburgh were appointed, and took their seats in June term, 1855.



CASES ADJUDGED

IN THE

COURT OF ERRORS AND APPEALS,

OF THE

STATE OF NEW JERSEY,

ON APPEAL FROM THE COURT OF CHANCERY.

MARCH TERM, 1853.

JAMES M. REDMOND, appellant, and PHILEMON DICKERSON, who sues for the use, &c., and others, respondents.

The directors of an incorporated company cannot speculate with the funds or credit of the company, and appropriate to themselves the profit of such speculation. They cannot, in making sales, or purchases for the company, take advantage of their position as directors, and either directly or indirectly, speculate upon the company.

If such a transaction has involved a complainant in a law suit, there is no propriety in his appealing to a court of conscience to give him redress, which he is not entitled to by the strict rules of the common law.

Although a demurrer admits all the facts alleged in the bill, where a bill *alleged as a fact*, that a check was paid, and then proceeded to detail the *manner* and circumstances of its payment, and the circumstances appealed to, to show its payment, did not establish the fact. It was *held* that the allegation amounted to nothing.

The bill alleges, that the Boudinot Manufacturing Company was incorporated on the 12th day of February, 1835, with a capital stock not to exceed $200,000 to be divided into shares of one hundred dollars each, and that so soon

as the sum of ten thousand dollars of such capital should be paid in, or received satisfactorily, the said company were authorized to commence operations under their charter; that soon after the charter was granted, three hundred shares of the stock were subscribed and paid up in full to their par value of one hundred dollars per share; that the company commenced business operations; that in the year 1843 they became unable, for want of funds, to proceed, and accordingly suspended their business; that during that year, James M. Redmond, the complainant, made an agreement with Philemon Dickerson, John C. Benson and Samuel G. Wheeler to purchase and divide equally among themselves the capital stock of the said company, with the intention of renewing business; that in pursuance of said agreement, Redmond purchased one hundred and twenty-six shares, Dickerson ninety-one shares, Benson five shares, and Wheeler five shares, making in all two hundred and twenty-seven shares, in which they were all equally interested; leaving seventy-three shares out-standing, and which were owned by Alfred Stoutenburgh and Edward Laffan; that a meeting of the stockholders was then called, at which the directors severally resigned their offices, and the complainant, together with the said Dickerson, Benson, Wheeler and John M. Gould (to whom Mr. Dickerson had transferred one share of stock to qualify him,) were elected directors; Philemon Dickerson was chosen president, Benson agent, and Samuel G. Wheeler commission merchant of the company, all to act without compensation; that the complainant, and his partners in the stock, as before mentioned, then offered to Stoutenburgh and Laffan to advance funds with them in proportion to the shares they respectively held, to enable the company to recommence business; that Stoutenburgh and Laffan refusing, the complainant and his said partners made application to the legislature for a supplement to the charter of the company, and which was passed March 4th, 1844; by which supplement the company were authorized to increase the par value of the shares from one hundred to one hundred and fifty dollars each; that the directors called



in an instalment of ten dollars on each share, to be paid in on the first day of June, then next ensuing; that before the passage of the resolution to call in this instalment, the complainant and his associates, Dickerson, Benson and Wheeler, had made a contract with one Hamilton Gay for a large lot of cotton machinery, at a price of eighteen thousand eight hundred dollars, to be delivered on or before the tenth day of the same month of June aforesaid, at which time they were bound to pay six thousand eight hundred dollars on account of said contract, and to secure the payment of the balance, twelve thousand dollars, by a mortgage on said machinery, and which machinery had been purchased with the intention of having the same conveyed to the company as soon as the same could safely and properly be done, and which could not be until Stoutenburgh and Laffan either paid up their instalments, or their stock was declared forfeited; that Stoutenburgh and Laffan did not pay the ten per cent. called in, and on the sixth of the same month of June aforesaid, by a resolution of the directors, their stock was declared forfeited; that on the said sixth of June, the complainant, in order to comply with the terms of the said act, made and delivered to the directors his check, as follows: "Cashier of the Bank of New York, pay to the order of P. Dickerson, President of the Boudinot Manufacturing Company, Twelve Hundred and Sixty Dollars," which sum was the amount of the instalment of ten per cent. on the one hundred and twenty-six shares standing in his name as before mentioned; and each of his associates gave some check or memorandum in writing, for the ten per cent. on the shares standing in their names respectively; that at that time the complainant owned but one-quarter of the two hundred and twenty-seven shares purchased as before mentioned; that the checks were given as mere memoranda, to remain until the complainant and his said associates should transfer to the said company the said machinery purchased of Hamilton Gay, and that it was expressly agreed by the said company that the said checks should be cancelled upon such transfers being made; that at the same meeting of the



directors, after the shares of Stoutenburgh and Laffan had been declared forfeited, the said company *according to the original understanding of the parties*, resolved to purchase of the complainant and his associates (being the same persons as the company) the said machinery for the sum of twenty-eight thousand eight hundred dollars; that the said company assumed the payment of the encumbrance on the machinery of twelve thousand dollars, and ordered their president and secretary to issue one hundred and fifty-two shares of the capital stock at their par value of one hundred and ten dollars a share, amounting to the sum of sixteen thousand seven hundred and twenty dollars, the balance due the complainant and his associates within eighty dollars; that soon after the said meeting, the said complainant and his associates paid, and secured to be paid, to the said Gay, from their own funds and credits, each one equal quarter part of the said sum of six thousand eight hundred dollars; took a conveyance of the machinery and gave a mortgage thereon for the said $12,000, and forthwith conveyed the said machinery to the company, *it never having been in the possession of the complainant or his associates;* that there was no entry made on the books of the transaction, and that the one hundred and fifty-two shares of stock were not issued; that in the fall of the year, the said complainant and Dickerson ascertained the affairs of the company to be involved in obscurity, and the books of the company to be loosely kept, whereupon the company came to a settlement with Wheeler, and the complainant purchased all Wheeler's stock and interest; that the accounts were then adjusted, and a receipt given to Wheeler in full, in which adjustment no account, or charge, of the check in question was made against the complainant; that on the first of March, 1845, the complainant, Dickerson and Benson, settled up all the affairs of the company, adjusted the accounts, and opened new books; which accounts, so opened, set forth the actual state of the debts and credits of the company with the complainant and his associates and all other persons, so far as the names could be ascertained; that by these books and



accounts, it appears, that the capital stock of the said company was valued at four hundred and seventy-nine shares, at one hundred and ten dollars per share, and it was declared that the same was paid up in full by the machinery, valued at fifty-two thousand six hundred and ninety dollars, and the complainant and his partners were credited upon the second books with the full par value of the stock, and were not charged with the said checks; that about the first September, 1845, the complainant negotiated with John Wood and Nathaniel S. Merritt for the sale of his stock, and exhibited to them a balance sheet from these books, and sold them his stock upon this exhibit, and that they purchased no check or claim against him; that the check was filed away among cancelled papers of the company, was found by Wood and Merritt, or their agents, and in 1849 a suit was commenced on this check against the complainant, in the name of Philemon Dickerson, president, for the use of the Boudinot Manufacturing Company, who used the name of Philemon Dickerson, as president; that on the 16th of June, 1849, upon a bill exhibited in the court by one of the creditors of the company, under the act entitled "An act to prevent fraud by Incorporated Companies," an injunction was issued against the company, and William Gledhill and Halmagh Van Winkle were appointed receivers; that at the instigation of the stockholders of the said company, the said receivers are now prosecuting the said suit upon the said check.

The prayer of the bill is, that the receivers may be decreed to deliver up to the complainant his said check, and the same be declared paid and satisfied; that the said Philemon Dickerson, John C. Benson and Samuel G. Wheeler may be decreed to be partners with the complainant in the transaction referred to, and liable to contribute to the expenses of the said suit at law, as well as their proportion of the sum, if any, found due on the check, and that the receivers may be enjoined from proceeding any further with the said suit at law.

On the 18th day of May, 1850, the Chancellor made an order for the injunction, according to the prayer of the bill.

On the 17th September, 1850, Philemon Dickerson, who sues for the use of "The Boudinot Manufacturing Company," William Gledhill and Halmagh Van Winkle, receivers for the creditors and stockholders of "The Boudinot Manufacturing Company," by their solicitor, filed their joint and several demurrer to the bill.

On the same day, John C. Benson, by John M. Gould, his solicitor, filed his several answer. And on the 13th December, 1850, Philemon Dickerson, by John M. Gould, his solicitor, filed his several answer.

THE CHANCELLOR. Upon the argument of this demurrer, it was insisted,

First—That there is no equity in the complainant's bill.

Second—That John C. Benson and Samuel G. Wheeler are not proper parties to the suit.

It is manifest this bill cannot be sustained, without the court's giving its sanction to the transaction between the complainant and his associates, in reference to the machinery purchased of Hamilton Gay.

There were three hundred shares of the stock of "The Boudinot Manufacturing Company" issued, and they were paid up in full. The par value being one hundred dollars per share, the capital paid in amounted to thirty thousand dollars.

The complainant, together with Philemon Dickerson, John C. Benson and Samuel G. Wheeler, purchased all the stock issued, except seventy-three shares. They were elected directors of the company, in connection with John M. Gould, to whom one share had been transferred, to qualify him to act as director. Having procured a supplement to the original act of incorporation, authorizing an increase of the par value of the shares from one hundred to one hundred and fifty dollars each: in pursuance of this supplemental act, the directors, on the 5th of September, 1844, called in an instal-



ment of ten per cent. on each share of the capital stock issued, to be paid on or before the first day of June then next. Before this resolution was adopted, the complainant and Dickerson, Benson, and Wheeler, had made the contract with Hamilton Gay for the machinery. They were to pay for it the sum of eighteen thousand eight hundred dollars, of which sum six thousand eight hundred dollars was to be cash, and the balance, twelve thousand dollars, to be secured by a mortgage on the machinery. When they made this contract, they constituted a majority of the board of directors, there being but five directors, and the fifth one, John M. Gould, qualified to act by holding one share of stock, of which they were the owners, and which they had transferred to him to make him eligible as a director.

There was some disagreement on the argument, whether or not it appeared by the bill, that at the time of making the contract in question, the complainant and his associates were directors of the company. But I think this is very clear from the order of the transactions set forth in the bill, and that the complainant did not intend to conceal or question this fact.

At the time this contract was made with Gay, there was an understanding between the complainant, and Dickerson, Benson, and Wheeler, as associates, and the same individuals as directors of the company, that they should purchase this machinery for the company. The instalment was to be paid in on the first of June, and the machinery was to be delivered on the sixth of June. It was not to be delivered until the sixth, lest, as the bill alleges, the stockholders who should not have paid up their instalments, might derive some benefit from the purchase. It was purchased by the complainant and his associates, as the bill states, with the intention of having the same conveyed to the company, as soon as it could be safely and properly done. On the sixth of June, when the difficulty apprehended was removed by the forfeiture of Stoutenburgh and Laffan's stock, the directors passed a resolution "according to the original understanding of the parties," that the company should purchase the machinery of

the said associates for the sum of twenty-eight thousand eight hundred dollars.

The machinery was then transferred to the company, without ever having been in the possession of the complainant, or of his associates.

Thus the complainant, and the three directors who were associated with him, made a profit out of the company of ten thousand dollars.

According to the complainant's own statement, they did not risk one farthing in the transaction. They bought the machinery for the company, and had it depreciated on their hands, in the interval between the purchase and the delivery, the loss would have been sustained by the company, and not by them. They were but the agents of the company, and carried on the negotiation in their own names, merely for the purpose mentioned in the bill, to prevent defaulting stockholders from deriving any benefit from it, if they should make default in not paying up their instalments.

Is it lawful for the directors of an incorporated company thus to speculate out of the company in the purchase or sale of materials which are essential to carry on its business operations?

This company was incorporated "for the purpose of manufacturing cotton, woolen, hemp, or silk, and generally all articles manufactured from all, or either, of these articles, in their several and various branches." It was necessary for them to procure a mill and machinery to carry on their business. Now, if after the capital had been paid in, the individuals composing the first board of directors had purchased the machinery for eighteen thousand eight hundred dollars, and then transferred it to the company for the consideration of twenty-eight thousand eight hundred dollars, making a speculation for themselves of a profit of ten thousand dollars, would the transaction be one, which, if brought before a court of equity, ought to receive its sanction? Would the court aid the individuals composing the direction in reaping the fruits of such an arrangement?

But this view of the case was combatted with great ear-



nestness and ability by the complainant's counsel. He insisted that the transaction was no injury to any one—that these directors, themselves owning all the stock, no one else was interested or could lose by it.

If these individuals did not anticipate a profit in some way, it is difficult to conceive why they should have put the machinery in at an advance of ten thousand dollars. If they did expect a profit, it was to be made out of some other persons than themselves.

But were not the public interested? Why did the charter require a certain amount of money to be paid in, as capital, upon which the company were to do business? Was it not for the protection of the public, with whom the company were to obtain credit, and to deal? And did it make no difference to the public, whether the capital was *bona fide* paid in, or was represented by machinery valued at an extravagant price? The company, in payment for this machinery, issued one hundred and fifty-two shares of stock. Had this stock been paid for in money, they would have realised sixteen thousand seven hundred and twenty dollars; and instead of having a mortgage upon their machinery of twelve thousand dollars, they would have incurred an outstanding debt of but two thousand and eighty dollars. The company had been unsuccessful in business, and had become so embarrassed as to render it necessary to resort to legislative aid, in order to furnish a new capital, that they might resume business. Was not the important trust committed to these directors to manage this capital, as well for the protection of the public, as for the profit of the stockholders? Did it make no difference, though these directors were the sole stockholders, whether that capital was improvidently diminished, or safely guarded and preserved, as a fund, for the future operations of the company? Was it not a breach of trust, for the directors so to speculate on that capital for their individual benefit, as to lessen the security which the legislature had intended to provide for the protection of their dealers and the business community? The consequences are before us. The company is now insolvent, and

its creditors are ten thousand dollars worse off, on account of this speculation.

The directors of an incorporated company cannot speculate with the funds or credit of the company, and appropriate to themselves the profits of such speculations. They cannot, in making sales or purchases for the company, take advantage of their position as directors, and either directly, or indirectly, speculate upon the company. If they are the only persons interested as stockholders, yet, if such speculations impair the capital stock, and have a tendency to substitute a fictitious for a real capital, such transactions are opposed to the policy of their act of incorporation, and cannot. in any manner, be countenanced by a court of equity.

There is no reason given in the bill, showing the least propriety why the complainant and his associates should derive from the purchase of this machinery a profit of ten thousand dollars. They assumed no responsibilities, or ran no risks, for which this profit could be fairly considered a just compensation. If the transaction has involved the complainant in a law-suit, there is no propriety in his appealing to a court of conscience to give him redress, which he is not entitled to by the strict rules of the common law.

But, if I am wrong in the view I have taken, and if the transaction referred to will stand the test of law and equity, I think it is plain, from the facts stated in the bill, that the check of twelve hundred and sixty dollars has never been paid, nor *bona fide* satisfied.

I would here remark, that the complainant's counsel is undoubtedly correct in his position that the demurrer admits all the facts alleged in the bill, and there is no room left for conjecture or mere inference. But though the bill alleges it as a fact, that the check was paid, and then proceeds to detail the manner and the circumstances of its payment, if those circumstances appealed to to show its payment do not establish the fact, the allegation amounts to nothing.

Without any conjecture, or any argument on the facts, it appears to me the statements of the bill show most conclusively that the check in question has never been paid.



The complainant had standing in his name one hundred and twenty-six shares of stock when the instalment of ten per cent. was paid in. He gave this check of twelve hundred and sixty dollars to pay the instalments on these shares.

His associates gave their checks respectively for the amount of the ten per cent. on the shares standing in their respective names. The amount of shares standing in the name of the complainant and his associates was two hundred and twenty-seven; the sum total of the checks was two thousand two hundred and seventy dollars.

The machinery was sold to the company for the sum of twenty-eight thousand eight hundred dollars. The company assumed the mortgage of twelve thousand dollars, leaving due to the complainant and his associates, sixteen thousand eight hundred dollars. To pay this balance of sixteen thousand eight hundred dollars, the directors, in the language of the bill, "ordered the president and secretary to issue one hundred and fifty-two shares of the capital stock, which, at their par value of one hundred and ten dollars, amounted to the balance due your orator and his associates within eighty dollars." The shares were not then transferred, but credit was given for them afterwards, and it is admitted that the complainant and his associates received them.

In this transaction, and in this way, the bill alleges, the checks were paid. And yet it is admitted that all the company owed the associates was sixteen thousand eight hundred dollars, and that the one hundred and fifty-two shares of stock—par value, sixteen thousand seven hundred and twenty dollars—paid the sum due to within eighty dollars. The accounts, then, stood thus:—The complainant and his associates owed the company two thousand two hundred and seventy dollars on their checks, and sixteen thousand seven hundred and twenty dollars for one hundred and fifty-two shares of stock, making a total of eighteen thousand nine hundred and ninety dollars. The company owed them sixteen thousand eight hundred dollars for the machinery, leaving a balance due the company of two thousand one hundred and ninety dollars.

How, then, was the check of one thousand two hundred and sixty dollars paid in this negotiation? There is no other way in which it is alleged to have been paid. How was it carried into this account? What had the check to do with the account?

It is true, the bill alleges that the check was given as a mere memorandum, to be delivered up when the machinery was transferred to the company—that after the transfer, the directors *considered* the check paid—that through inadvertence it was not delivered to the complainant, but was filed away with the cancelled papers of the company—that some months after, when the accounts were made up, the check was not carried into them as a debt due the company. But is not all this accounted for, from the confused manner in which, as the complainant's themselves say, the accounts were kept? Again, it is alleged, that subsequently, "an account of the capital stock was made, (called a stock ledger) at which time, and by reference to such books, it appears that the capital stock of said company was valued at four hundred and seventy-nine shares, at one hundred and ten dollars per share, and it was declared that the same was paid up in full by the machinery, valued at fifty-two thousand six hundred and ninety dollars." The bill has before undertaken to give us an account of the number of shares issued, and of the particular manner in which they were paid. It tells us that three hundred shares were originally issued, which the complainant and his associates became the owners of two hundred and twenty-seven. The remaining seventy-three shares of this three hundred were forfeited. One hundred and fifty-two more shares were issued for the machinery. This makes the whole stock, including the seventy-three forfeited shares, four hundred and fifty-two shares. And yet this stock ledger declares there are four hundred and seventy-nine shares of stock. And it declares, too, that one hundred and ten dollars per share was paid on them, when the ten per cent. was, in fact, never paid on the seventy-three shares; and it is unaccounted for how the twenty-nine additional shares got afloat. The complainant does not allege

Laffan would pay their proportion towards it; but they refused to advance any more money, or to sell their stock for any reasonable sum.

The associates, for the purpose of relieving themselves of this embarrassment, applied to the legislature and procured the passage of a supplement to the charter of the company. By this supplement they were authorized to increase the capital stock to three hundred thousand dollars, to be divided into shares of one hundred and fifty dollars each; and to demand from the stockholders an additional sum of fifty dollars on each share already subscribed for, by instalments of ten dollars per share, on thirty days' notice. The penalty for neglect of payment was the forfeiture of the stock.

The directors having by a formal resolution accepted the supplement, resolved to call in an instalment of ten dollars on each share, payable on or before the first day of June then next, and gave the notice required.

Stoutenburgh and Laffan neglected to pay the instalment, and the directors on the sixth day of June declared their seventy-three shares to be forfeited to the company.

At the same time, the complainant, on payment of the instalment due upon the shares standing in his name, gave his check on the Bank of New York, for twelve hundred and and sixty dollars, payable to the order of Philemon Dickerson, President of the Boudinot Manufacturing Company; and each of the other associates gave some check or memorandum in writing, for the instalments due upon the shares held by them respectively. These checks, the complainant alleges, were given as their memoranda, to remain until they could transfer to the company certain machinery which they had purchased of one Hamilton Gay for sixteen thousand eight hundred dollars.

The company, then, in pursuance of the original understanding of the parties, agreed to purchase of the associates that machinery for twenty-six thousand eight hundred dollars, being an advance of ten thousand dollars upon their purchase of Mr. Gay. In payment of this machinery, the company gave a mortgage upon it for twelve thousand dol-

lars, and issued to the associates one hundred and fifty-two shares of the capital stock, which at its par value of one hundred and ten dollars, amounted to the balance due them within the sum of eighty dollars.

The complainant, after this, purchased the interest of Wheeler, and in September, 1845, Wood and Merritt purchased of the complainant all his interest in the company, after a balance sheet had been furnished to them, exhibiting the affairs of the corporation, but in which no mention was made of the check. It is alleged that it was understood by the directors that the check and memoranda given for the instalments were paid off in the negotiation of the machinery, and were filed away among the cancelled papers.

Wood and Merritt having become the owners of all the stock and effects of the company, brought an action at law upon the check, in the name of Philemon Dickerson, President of the Boudinot Manufacturing Company. After the commencement of that suit, certain creditors of the company procured an injunction, restraining them from the exercise of their corporate powers, and the appointment of receivers, who are prosecuting the action.

The bill in this cause was filed to stay the proceedings at law, and for specific and general relief. An injunction was issued, and Messrs. Dickerson and Benson have filed their several answers. A general demurrer to the bill was filed on behalf of the receivers. The Chancellor, after argument, sustained the demurrer and dismissed the bill.

From this decree the complainant appeals to this court, and the question is, Whether the demurrer was properly sustained?

The gravamen of the bill is, that the complainant is sued at law against equity and good conscience. To maintain this position, it is insisted:—*First*, that the check was given as a mere memorandum, to remain until the machinery should be transferred to the company, and that it was agreed by the company that it should be cancelled upon such transfer being made.

The directors, in this matter, were proceeding under the

authority of the supplement to their charter. That act authorized them to demand from the stockholders the additional sum of fifty dollars on each share of the capital stock already subscribed, not exceeding ten dollars on each share, at any one time; and by way of penalty for neglect to pay after the proper notice, they might declare the stock forfeited.

This was fully understood by the directors, and promptly acted upon by them in their resolutions of the sixth of June, declaring the seventy-three shares of Stoutenburg and Laffan to be forfeited to the company for default of payment. And upon their own construction it must be held, that the check and other memoranda given by the directors individually were taken as cash, and intended to be *bona fide* payments of the amounts mentioned in them; otherwise their own stock became liable to forfeiture, and it is not to be supposed that they would impose upon others the penalty which they had themselves incurred.

If they were not intended as payments, the directors would be obnoxious to the charge of having procured the supplement and called in the instalment, for the mere purpose of wresting from the hands of Stoutenburgh and Laffan by the forms of law, the shares of stock which they had failed to get by fair negotiation. The object of increasing the value of the shares was to raise funds to pay the debts and put the works in operation, and if the directors paid nothing upon their shares, they might be suspected of the design of raising funds out of their fellow-corporators without making any advances themselves.

If these checks were not taken as payments, and to be collected and converted into money, then the directors must have ventured upon an expedient to raise funds to increase the nominal value of the stock, and to create a fictitious credit, which is but too common with the managers of corporations, but which a court of justice can neither uphold nor approve. Such transactions may be sanctioned by the code of those whose motto is

"*Rem, facias rem,*
Rectè si possis; si non, quocunque modo rem,"

but they cannot stand the test of law or equity. They who engage in them, whether tempted by the love of gain, or seduced by the force of example, must act upon their own responsibility, and at their own risk, and look to the end to justify the means. The aid or sanction of the courts they will seek in vain.

The suspicion even, of this, we cannot entertain towards these directors. Their character should be a guarantee of the honesty of their intentions, and the alternative is, that the check was taken as a payment, to be converted into money for the purposes mentioned in the bill.

Secondly—It is urged that the action at law is against equity, because the check was considered to have been paid, and was meant to be cancelled.

The allegation of payment is accompanied by a statement of the manner in which it was done, to wit, that the machinery purchased of Mr. Gay, was conveyed to the company at an advance of ten thousand dollars; and that in the estimates, and by the understanding of the directors, the whole stock was paid by this and other machinery.

It is unnecessary for the purpose of this suit, to inquire into the validity of this sale by the associates, as individuals to themselves, as directors, at such an advance; or of its influence upon their creditors and the public. It is sufficient that it appears by the bill that the company directed the issue to the associates, of one hundred and fifty-two shares of the capital stock, of the par value of sixteen thousand seven hundred and twenty dollars, expressly to pay for the machinery, and that by it they did pay to within eighty dollars of the sum of sixteen thousand eight hundred dollars, paid by the associates from their own funds to Mr. Gay. The machinery, therefore, cannot be considered as a payment of the check and memoranda given for the instalment.

Upon the merits of the case as made by the complainant, the bill was properly dismissed.

There is another reason why the demurrer was well sustained. The bill does not present a case in which the aid of a court of equity is required. It does not seek a discovery

to enable the complainant to make out his defence. There is no allegation in it that is not proper to be proved at law. The whole transaction is within the knowledge of some or all of the associates, and they are competent witnesses. The books and papers can be procured on notice or by process, or their contents be proved. The prayer that the check be given up to be cancelled, is that which every defendant at law might make, and if with success, he would find an easy way of changing the forum of every action. The contribution prayed for is a matter entirely between the associates, and cannot be considered in a suit between the owner of the check and the complainant. If the facts presented by the bill afford a defence, the complainant has adequate relief at law, and a court of equity should not take jurisdiction of the case.

Let the decree be affirmed, with costs.

Decree affirmed unanimously.

RICHARD P. THOMPSON, Attorney General, DAVID J. ANDERSON and JOHN B AYCRIGG, Appellants, and THE PATERSON and HUDSON RIVER RAILROAD and others, Respondents.

The right of navigation is a pre-existing public right, and he who claims authority to impair or obstruct this right by legislative grant, must show it by the clear and explicit terms of the grant itself, or at least by necessary implication.

The erection of bridges over rivers, *with proper draws*, so constructed and placed as to do the least possible injury to navigation, has never been held to be a nuisance. The slight, but unavoidable obstruction which such bridges occasion is a necessary evil which must be borne for the sake of the public good, which demands it.

Although it is said "that courts of equity will grant an injunction to restrain a nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence, and that if the evidence be conflicting, and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition." The cases go no further than the familiar doctrine that equity will not ordinarily interfere in case of nuisance when the complainant has a perfect remedy at law. It is important in cases where obstructions to public navigation are about to be erected, and which, when erected, can only be removed at great expense and sacrifice, that the court should exercise a preventive remedy by injunction.

So where the defendants were about to erect a permanent railroad bridge on a line of great and increasing travel, and were required to place it in such a position as *to do the least possible injury to navigation*. And the complainants alleged that the position in which it was contemplated to place the piers and draw, was *not* the one which would do the least injury to navigation, and asked a temporary injunction until the question as to whether the piers and draw were in the right position, could be examined and settled. And it appeared that the defendants were placing the draws in an *unusual* and *unnatural* position. And the charges in the bill were supported by affidavits, conclusively showing what, in the judgments of persons best able to form an opinion, the effect of the proposed erection would be. The injunction was decreed, to extend no further than to restrain the defendants from erecting their proposed piers and draws in the position proposed, until the question whether that was the proper position was determined.

The appellants filed their bill of complaint in the Court of Chancery, on the 16th day of November, 1852, in the following words, to wit:

IN CHANCERY, NEW JERSEY.

To the Honorable Benjamin Williamson, Chancellor of the State of New Jersey:

Informing, sheweth unto your honor, Richard P. Thompson, Esquire, attorney general of the state of New Jersey, in behalf of said state, and by and at the relation of David J. Anderson and John B. Aycrigg in behalf of themselves, and of the other owners of the docks and wharves, storehouses, lumber and coal yards, at the township of Lodi, in the county of Bergen, and at the township of Acquackanonck, in the county of Passaic, on the Passaic river, and north of the bridge hereinafter mentioned, and of other real estate above the said bridge, on the shores of said river, and other owners of vessels navigating said river to and from the said township of Acquackanonck to the city of New York, and intermediate places, and using the said river for the purposes of trade, commerce, and navigation therein.

And also humbly complaining, shew unto your honor, your orators David J. Anderson of the said township of Lodi, and John B. Aycrigg, of the said township of Acquackanonck, in behalf of themselves and others as aforesaid, that by an act of the legislature of the state of New Jersey, passed the twenty-first day of January, A. D. eighteen hundred and thirty-one, entitled "An act to incorporate the Paterson and Hudson River Railroad Company," John Colt, Robert Carrick, Abraham Godwin, Jr., Richard R. Morris, William T. Buckner, Elias B. D. Ogden, and Andrew P. Hopper, and such other person or persons as might thereafter be associated with them, were constituted a body corporate and politic in law, by the name of "The President and Directors of the Paterson and Hudson River Railroad Company," with power among other things in and by the said act, for the president and directors of the said company, to survey, lay out, and construct a railroad from the town of Paterson, and crossing the rivers Passaic and Hackensack to the Hudson river, and for that purpose the said president and directors of the said company were further authorized to enter upon all lands and waters, for the purpose of exploring, survey-

ing, and laying out said road, and locating the same, and when the same was thus located and the survey deposited in the office of the secretary of state, to enter upon and take possession of such lands, and all other things suitable and necessary to the completion of the said road. And in and by the said act it was further provided, that the said company should have the privilege and authority to erect, build, and maintain on the rivers Passaic and Hackensack respectively, such wharves, piers, bridges, and other facilities as they might think expedient and necessary for the full enjoyment of all the benefits conferred by the said act, subject to the restrictions therein named, and for the safety of the navigation, one or more lamps, it was directed, should be placed at one side of the draw of said bridge, and continued to be lighted, before it grew dark every evening, until daylight, at the expense of the said company, and that the said company should keep at the said bridge a careful person to open the draws for the free passage of vessels with standing masts; and for each neglect to light the said lamps, a penalty was imposed on the said directors. And it was by the said act further declared, that said act should be deemed and taken to be a public act, and should at all times be recognized as such, in all courts and places whatsoever, as in and by the said act of the legislature to which the attorney general aforesaid and your orators beg leave to refer, may and will more fully and at large appear. And the attorney general at the relation aforesaid, and your orators further shew, that since the passage of the said act there have been passed by the legislature of the state of New Jersey supplements to the same, to which they pray leave to refer for the contents and provisions thereof.

And the attorney general at the relation aforesaid and your orators further shew, that after the passage of the said act, the said railroad company became duly organized, and have constructed a railroad from the town of Paterson to the Hudson river, with bridges across the rivers Passaic and Hackensack, crossing the said river Passaic at a short distance below, and southerly from and near to the town of



Acquackanonck, in the county of Passaic, and which road has been in use many years last past.

And the attorney general at the relation aforesaid and your orators further shew unto your honor, that the Passaic river in this state now is, and from time immemorial has been, a public navigable river, that the tide ebbs and flows therein, from the water commonly called Newark bay, formed by the junction of the Passaic and Hackensack rivers, to and from the said township of Acquackanonck, and between one and two miles beyond and above the bridge hereinafter mentioned, and about to be built by the said company or their lessees or assigns; and that all the citizens and inhabitants of this state always have had, and of right now have and ought at all times to have, free use of the navigation of said river, and liberty at all times to pass and repass, and navigate up and down the said river, without any let, obstruction, or hindrance whatsoever: that said Passaic river is narrow and crooked, and in many places shallow and of difficult navigation, admitting of vessels drawing not to exceed in many places seven feet of water: that a very considerable navigation and commerce is carried on upon said river, up to the said town of Acquackanonck, and above the bridge hereinafter mentioned: that vessels now daily navigate said river, of various dimensions, between the cities of New York and Newark, and the said town of Acquackanonck, and one vessel sails regularly between said town and Troy, in the state of New York; that vessels are now engaged in running between the said town of Acquackanonck and the city of New York, which are of great advantage to the country thereabouts: that vessels have been in the habit of running on the said river for very many years to the like advantage, and that at the present time three vessels are running on the said river up to Acquackanonck, in two of which your orator David J. Anderson is part owner, and your orator David J. Anderson has recently launched a steamboat thirty-three feet wide and one hundred and ten feet long, which is intended, and was built expressly to run between the said town of Acquackanonck and the city of New York.

And the attorney-general at the relation aforesaid and your orators further shew, that your orators or one of them, are the owners of docks and wharves, storehouses, lumber and coal yards and other real estate on the said Passaic river, and above the said contemplated bridge, and the owners, or interested in vessels engaged in commerce and navigating the said river to and from the said town of Acquackanonck, above the said bridge, to the city of New York, to a considerable extent, and your orator, David J. Anderson, is carrying on merchandise and is a dealer in lumber, coal and divers other articles, for the transportation of which, he depends on the navigation of said river, and that the keeping of the navigation of said river free and unobstructed is of vital importance to their interests and to the business and convenience of the said town of Acquackanonck and its neighborhood.

And the said attorney-general at the relation aforesaid and your orators further shew upon your honor: that the said the president and directors of the Paterson and Hudson River Railroad Company, at some time on or about the fifteenth day of September last, leased or conveyed all the chartered rights of the said company, and the said road to "The Union Railroad Company," and which last named company, at or about the said time, also assigned and conveyed all their rights in the said lease to "The New York and Erie Railroad Company," who now claim to have the entire control of the said road, and as your orators are informed, the said right under the said lease, continues down to the expiration of the said charter of the Paterson and Hudson River Railroad Company.

And the said attorney-general at the relation aforesaid and your orators further shew, that the said the New York and Erie Railroad Company propose to alter the position of the draw of the bridge over the river Passaic, which crosses south of the town of Acquackanonck as aforesaid, and to place under the same a new set of stone piers, near the centre of the river, the draw to be placed between the said stone piers; that the said piers are intended to be each from



seven to eight feet broad, and of the width of the bridge, as the same shall be widened, to the extent of several feet beyond that of the present bridge; that the said the New York and Erie Railroad Company propose to place the said piers diagonally across the river, and at right angles with the bridge, and not with the current of the stream; that heretofore there has been no stone piers to the said bridge, but the same is supported by wooden piles and shore abutments of stone; that the placing of the said stone piers would materially impede the navigation of the said river, and not being placed in the line of the current of the river must render extremely dangerous if not impracticable the navigation of the river, with the vessels now navigating the same, and especially with the steamboat of your orator, David J. Anderson.

And the said attorney-general and your orators state, that by reason of the obstructions in the said river, a short delay in getting through the said draw, may and no doubt often will occasion a much larger hindrance, in preventing the said vessels from passing the said obstructions at the high tide, and that the stone piers will of necessity prevent all vessels coming into the draw from having the advantage of the wind to carry them through, which is essential to their progress, and will necessarily produce eddies in the wind. And as it seems to your orators, it will not be in the power of the said steamboat to tow any vessel through the said draw which is designed to constitute a part of its regular business.

And the said attorney-general at the relation aforesaid and your orators further shew unto your honor, that the said the president and directors of the Paterson and Hudson River Railroad Company, and their said lessees, the New York and Erie Railroad Company, disregarding the rights of the citizens of this state, and of your orators, who own property on the Passaic river, above the said bridge, and of those navigating the said river with vessels, and seeking to promote their own interest and convenience, at the expense of the public, and especially to the great damage and inconvenience of your orators, and others similarly situated,

and to the damage of all the good citizens of this state, residing at Acquackanonck aforesaid, and its neighborhood, and of all those having occasion to navigate said river, or who are in any wise interested in the commerce of this state, have caused or planned to be devised for construction as hereinbefore stated, their bridge and piers, at and across the said river Passaic, near and below the said town of Acquackanonck as aforesaid, and lower down said stream than the point to which vessels are accustomed to navigate, and through the draw of which they are obliged to pass to reach the premises of your orators, and in such manner as greatly to obstruct and injure the navigation of the said river, and altogether to prevent the free and uninterrupted navigation thereof, and will, as your orators believe, go on and complete the said bridge with the said piers, on the said plan, unless restrained from so doing by the order of this court; that your orators, David J. Anderson and John B. Aycrigg, with others interested therein, caused a written notice to be served on Thomas Addis Emmet, Esquire, the superintendent of the said work, on the twenty-fifth day of October last, which he promised to lay before the board, and which notice was of the following tenor and purport, to wit:

The undersigned boat owners on the Passaic river, above the railroad bridge you are now about rebuilding, have understood that the draw in said bridge, for the passage of vessels, is to be constructed at right angles with the line of the bridge; if that be so, of our protest against it. We respectfully suggest the propriety of constructing the draw to meet the wishes and requirements of the boat owners, who are the parties most immediately interested, and would meet with you at any time to state those requirements. The line of the draw should be in a line with the tide, and any deviation from it will be contested.

D. J. ANDERSON,
JOHN A. POST,
JOHN B. AYCRIGG,
WILLIAM S. ANDERSON,
WILLIAM KIP,
NICHOLAS KIP.



And which notice your orators hoped would have been sufficient to have induced the said company and their lessees to have altered their plan for the construction of the said piers and bridge, and your orators, under that belief, suspended all proceedings against the said company and their said lessees, until it became manifest that it was the intention of the said company and their said lessees to disregard the said notice, and the interests and wishes of your orators, and to go on and complete said piers and bridge in manner aforesaid.

And the said attorney-general at the relation aforesaid, and your orators further shew unto your honor, that the said company, or their said lessees, by their agents, workmen and servants, are now actively engaged in building two piers or bulkheads of stone, for the said bridge over the river Passaic, on the plan aforesaid, and that the same is now in process of completion; that within a day or two the said the New York and Erie Railroad Company have been engaged upon, and have now in part completed two coffer-dams, for the purpose of erecting the said piers, and are quarrying and dressing stone for the purposes of the said piers; that they have engaged a number of hands, twenty or more in number, and have by their agents, as your orators are informed and believe, declared their intentions to build the said piers in manner aforesaid, and that with promptness and despatch. And that Thomas Addis Emmet, Esquire, has been there directing the said works, but by what authority your orators are not informed; that the erection of said bridge, and the piers or bulkheads in manner aforesaid, will form an obstruction to the freshets and currents of said river, and that all vessels passing through the draw of said bridge, will be greatly delayed and hindered, and their safety much endangered by reason of the peculiar manner in which the piers of said bridge are constructed; that the erection of the said piers or bulkheads as aforesaid, will be a great nuisance to all the citizens of Acquackanonck and the surrounding country, especially those above the said bridge, and will greatly impede the commerce and business thereof,

and its growth and prosperity; that the value of all the docks and wharves, storehouses, lumber and coal-yards erected and located upon and along the river, especially those above the said bridge, and depending on the free navigation thereof, will be depreciated, and also that other lands lying on said river which are susceptible of being used for wharves and commercial purposes, and which derive their principal value therefrom, will also be greatly damaged.

And the attorney-general at the relation aforesaid, and your orators further show unto your honor, that the erection of the said piers and bulkheads and bridge in manner aforesaid, are not at all necessary for the purpose of the said road or bridge; but that the same may be constructed without causing so serious an obstruction to the navigation thereof.

And the said attorney-general in behalf of the state, insists and submits that the said company or their directors, or their said lessees or their agents, workmen or servants, have no right or authority to carry their said plan into effect, or to place piers or bulkheads or a bridge over the said Passaic in manner aforesaid, or in any other manner, which shall in any way interfere with or obstruct the free navigation of the said river, or whereby the free and uninterrupted navigation of vessels in said river can or may be obstructed in any manner whatever.

And now so it is, may it please your honor, that the said the president and directors of the Paterson and Hudson River Railroad Company, and the New York and Erie Railroad Company, Thomas Addis Emmet, Esquire, and others confederating with them, persist in continuing to construct the said piers, bulkheads and bridge on the river Passaic in manner aforesaid, and contemn the authority of the state of New Jersey, and the well defined common rights of the citizens thereof to the free and uninterrupted navigation of the said Passaic river, and reckless of the great, immediate and irreparable damages and injury which your orators will be subjected to and sustain thereby. And they claim the right so to do, and persist in their determination to erect the said piers or bulkheads and bridge, in manner aforesaid, and con-



tinue the work of actually erecting and constructing the same, and pretend to give out that they have authority and are warranted in so doing; the contrary whereof the said attorney-general at the relation aforesaid, and your orators charge to be true; all which actings and doings and pretences are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your relators and orators, and to the public wrong and nuisance of all the citizens of the state of New Jersey navigating the said Passaic river, or interested in the navigation thereof. To the end, therefore, that the said the president and directors of the Paterson and Hudson River Railroad Company, the New York and Erie Railroad Company, and the said Thomas Addis Emmet, Esquire, and their confederates may in such manner as is required by law, and the practice of this court full, true and perfect answer make to all and singular the premises, as fully as if the same were herein again repeated, and they thereto particularly interrogated, with all the attendant circumstances and incidental transactions, and that it may be decreed that the said the president and directors of the Paterson and Hudson River Railroad Company, the New York and Erie Railroad Company, and the said Thomas Addis Emmet, Esquire, the defendants herein, have no right, title or authority to construct the said piers or bulkheads and bridge in manner aforesaid; that they have no right to place in the said river, piers of stone at all of the dimensions aforesaid, or any other dimensions, and that if they have that right, the same must be so placed as to do the least injury to the navigation of the river, and with the current of the said river, in a line of the stream, and not at right angles with the said bridge, and that the said the Paterson and Hudson River Railroad Company, the New York and Erie Railroad Company and Thomas Addis Emmet, Esquire, and each and every of them, their agents, engineers, workmen and servants may be restrained by the order and decree, and writ of injunction of this court, from carrying into effect the plan devised and agreed upon, and determined to be carried into effect, as aforesaid, for build-

ing the said piers or bulkheads and bridge across the said river Passaic as aforesaid, in the manner hereinbefore set forth, and described, and as they are now proceeding to do, and are actually engaged in doing, and from building any stone piers in the said river under the said bridge, and that your honor may grant such further and other relief as the nature of the case may require, and shall be agreeable to law and equity.

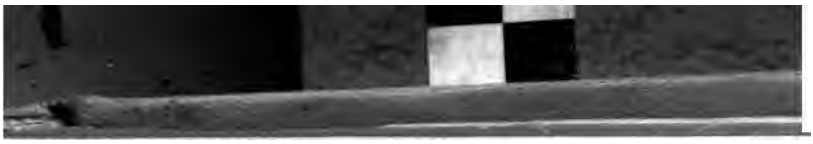
May it please your honor, the premises considered to grant unto the said attorney general and your orators, a writ or writs of injunction, issuing out of and under the seal of this honorable court, to be directed to the said the President and Directors of the Paterson and Hudson River Railroad Company, the New York and Erie Railroad Company, and Thomas Addis Emmet, Esq., and their confederates when discovered, their agents, engineers, workmen, and servants, restraining and enjoining them and every of them, in manner aforesaid; and also a writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said defendants and their confederates when discovered, commanding them and every of them on a certain day, and under a certain penalty therein to be inserted, to be and appear before your honor in this honorable court, then and there to answer all and singular the said premises, and to stand to and abide by such order and decree therein, as to your honor shall seem meet and shall be agreeable to equity and good conscience.

RICHARD P. THOMPSON,
Attorney General of New Jersey.

WM. PENNINGTON,
Solicitor and of Counsel with relators and complainants.

State of New Jersey, County of Passaic, ss:

David J. Anderson and John B. Aycrigg, complainants in the foregoing bill named, being duly severally sworn according to law, on their oaths do say, that those facts, matters, and things in the said bill mentioned and set forth, which relate to the acts and deeds of any other person or persons



than the complainants in the said bill named, they verily believe to be true, and that all other facts, matters, and things in said bill mentioned and set forth are true.

D. J. ANDERSON,
JOHN B. AYCRIGG.

Sworn and subscribed before me, the 13th day of November, 1852.

CORN'S G. VAN RIPER,
Master in Chancery.

State of New Jersey, ss:

Zackariah Keasler, of Acquackanonck, of full age, being duly sworn according to law, on his oath, saith: That he is master of the vessel called the Julia Morrell, of Acquackanonck, owned by Messrs. Anderson, Post & Co.; that he has been engaged in boating on the Passaic river upwards of twenty years; that he has been master of a vessel some fifteen years last passed; that he has examined the works in progress of erection for a draw in the railroad bridge across the Passaic river, immediately below Acquackanonck; that the position of the draw being diagonal to the current, and not in the line of the stream, will make the passage of vessels through the said draw difficult and dangerous at most times; that in time of freshets which are of frequent occurrence and with certain winds, the passage will be impracticable; that the draw should be in a line with the current and course of the river, and not at right angles to the bridge.

ZACKARIAH KEASLER.

Sworn and subscribed before me, the 13th day of November, A. D. 1852.

CORN'S G. VAN RIPER,
Master in Chancery.

State of New Jersey, Passaic County, ss:

The undersigned, Thomas Pettit, on his oath saith:—That he is master of the schooner Clara Post, belonging to and owned by Messrs. Anderson, Post & Co., lumber dealers at Acquackanonck, having examined the location of the draw

for the passage of vessels in the railroad bridge just below this village, over the navigable waters of the Passaic, about to be and now in active progress of construction by the Erie Railroad Company; the location of that draw being at right angles with the line of the bridge, and consequently crossways with the current and line of said river, will make the passage through said draw dangerous and hazardous at all times, and under certain and frequent circumstances, such as freshets and certain winds, impracticable without sustaining serious damage. The line of the draw should be in a line with the river and the current of the river, and the fact of its present construction being placed as above stated, I consider the greatest obstruction to the navigation of said river that can be conceived or imagined, and entirely unnecessary.

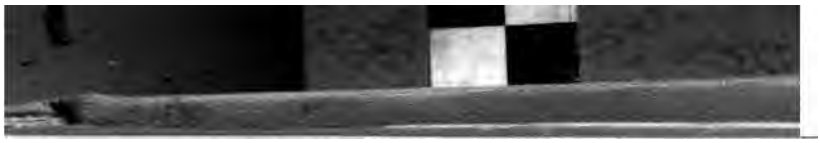
THOMAS PETTIT.

Sworn and subscribed before me, this 11th day of November, 1852.

CORN'S G. VAN RIPER,
Master in Chancery.

State of New Jersey, Passaic County, ss:

The undersigned, Henry Crawford, master of the schooner Eliza Jane, belonging to and owned by the Messrs. Kips, merchants at Acquackanonck, being duly sworn, on his oath says: That having carefully and deliberately examined the location of the draw for the passage of vessels, about to be constructed in the railroad bridge that crosses the navigable waters of the Passaic, just below the village of Acquackanonck; that the placing of the said draw in the middle of the bridge and said river, at right angles with the line of the bridge, and consequently the line of said draw for the passage of vessels, across the line of current of said river, would be not only a very serious obstruction, but in many respects ruinous to the navigation of said river, dangerous and hazardous for vessels to pass at all times, and under favorable circumstances; and when the water is high, under the influence of freshets, which we are subject to very fre-



quently throughout every season, and when the current by means of such freshets is running at an increased rate of rapidity, and very often for several days in succession, it would be to a very great extent impracticable, and decidedly imprudent to attempt a passage through said draw at all, under any circumstances.

H. CRAWFORD.

Taken and sworn before me, this 9th day of November, 1852.

CORN'S G. VAN RIPER,
Master in Chancery.

New Jersey, ss:

Benjamin Aycrigg, of full age, maketh oath and saith: That the map marked A was made by this deponent from actual surveys made by him since the morning of the 17th instant, and shows the true position of the shores of the river near Acquackanonk, in the county of Passaic, as found by him at the time of survey, (mostly low water); also the line of six feet soundings, at low water, above and near the bridge of Paterson and Hudson River Railroad; also the position of the railroad and of the bridge over the Passaic river, with the present draw, and the new draw proposed to be built, as indicated by the ranges of piles within the coffer dams (although this width being forty feet, does not correspond with the present reported width of the proposed draw); also the direction of the current above the draw indicated by the arrow, at the position where taken, at the last of the ebb tide, this being the only experiment that time has allowed; also a cross section of the valley at the railroad, showing the part dammed up by the works of the company, and the level of the water as found by taking the level from the gulley (marked thirty) pointed out to deponent by John V. S. Van Winkle, as a place just inundated by a freshet; also the position of the black walnut tree (marked twenty-six) to which he tied his boat, the ground being one foot five inches above the gulley; also the bars (marked twenty-seven) found to be at ground five feet nine inches below the gulley, and the

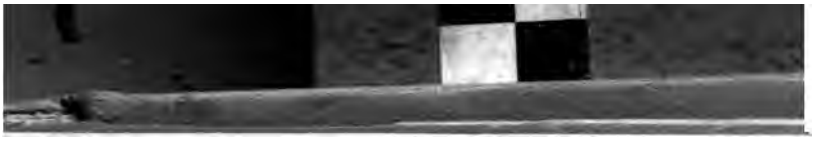
place at which the horse was drowned; also the barracks (marked thirty-one) five inches above the level of the gulley. These four points having been shown to deponent by said Van Winkle and having been referred to by the same, in his testimony. Said map also shows the position of the elm tree (marked thirty-two) on the west shore below the bridge, and the only tree of that description, the crotch of which is ten feet nine inches below the rail of the road, or one foot three inches higher than the freshet height shown by the above Van Winkle; said crotch from appearances may have closed a few inches. Likewise deponent has added (on a scale of twenty feet to one inch) at the south end of the map, the plan of part of the bridge, showing the position of the draws at right angles to the bridge, and consequently south forty-six degrees forty minutes west, also the broken line south twenty-five degrees west, being the direction of the current at the position indicated by the arrow on the larger map; also the broken line south twenty-nine degrees west, being the general direction of the river near the bridge, and the course that a vessel would usually take if unembarrassed; also the actual reported dimensions of a small steamboat preparing for use on this river, with her position when in the direction of the river, and the interference of the draw, showing that a forty feet draw, forty-five feet long, placed at right angles to the bridge, affords but about twenty-four feet six inches clear width, to a boat keeping the course of the river.

Deponent further states that he believes the said map and plan (marked A) to be correct in all respects, but from the haste with which the map has been prepared, it may contain some slight errors; still, from his familiarity with this kind of work, he can say with confidence, that for all the purposes intended, it is substantially correct.

B. AYCRIGG.

Sworn and subscribed before me, this 20th day of November, A. D. 1852.

CORN'S G. VAN RIPER,
Master in Chancery.



AFFIDAVITS OF DEFENDANTS.

Henry Petingale being duly sworn according to law, deposeth and saith: He is in the employ of the New York and Erie Railroad Company as assistant engineer; deponent has laid out all the work for the construction of the piers for the draw in the railroad bridge at Acquackanonck, from plans furnished by Mr. Emmet; two coffer dams have been commenced, one nearly completed, and the other nearly half done; the foundation piles for the piers to rest upon have nearly all been driven; a large quantity of stone has been delivered and some of it has been dressed to meet the present plans; that about the 12th or 13th of October, 1852, they commenced laying out the work for the coffer dams, and the foundations for the piers; and deponent further saith that the new draw to be made in said bridge is to be forty-five feet wide at low water, and at the top of the draw it will be forty-seven feet wide; the new draw is to be placed in the middle of the river; the map marked A he says is a copy from a survey made by him, and as he believes is a correct map of the river and bridge as made by him; the map marked B is the map made by him from actual survey; in the plan proposed, all the piers on map B, except the two in red lines are to be removed, leaving the bridge to rest on the abutments and the stone piers on each side of the draw; those within black lines on map B are the present pile piers, which are to be removed; the dotted line on both maps, is the line of deepest water, as ascertained by this deponent from actual soundings, and the figures on said maps indicate the depth of water at which they are placed as ascertained by this deponent, from actual soundings; the depth of water as taken at low water this morning, is seven feet in the proposed draw, and six feet three inches in the present draw; and this deponent further saith, that from the bend of the river at Acquackanonck, the current sets from Acquackanonck towards the Bergen county side, above the railroad bridge, and below the railroad bridge it sets upon the Passaic side of the river; and this deponent believes that the

draw as proposed will be placed so as to receive the full force or current of the river.

HENRY PETINGALE.

Sworn and subscribed before me, this 17th of November, 1852.

S. D. CANFIELD,
Master in Chancery.

Philip Van Bussum, of Paterson, in the county of Passaic, being duly sworn according to law, deposeth and saith that he has known the railroad from Paterson to Jersey City ever since they commenced building it, and has been in the employ of the Paterson and Hudson River Railroad Company for about eighteen years; deponent further says that the railroad bridge erected at Acquackanonck was built in 1832 or 1833, and that the draw in said bridge as first made was in the same place as it now is except that it has been widened; that the bridge crosses the Passaic river at that place diagonally, and that the draw was built at right angles to the bridge; that said draw was built near the Passaic shore; that deponent worked on said bridge when the draw was widened, he helped drive the piles; that this deponent has never heard any complaint of said draw except that it was too near the shore, and that the railroad company built a fender to keep the boats from running on the shore; that this deponent never heard of any complaint of the angle at which the draw was made in the Passaic river; deponent has been all the time he has been in the employ of the company, engaged in the repairs of the road and bridges, and for the last three years has had the entire charge of the bridges, and from his position in the company he thinks he would naturally hear of any complaints against the draw; and this deponent further saith that at the time application was made to the legislature to compel the widening the draws of bridges over the Passaic, he never heard of any complaint of the angle of the draw.

PHILIP VAN BUSSUM.

Sworn and subscribed, November 17th, 1852, before me.

S. D. CANFIELD,
Master in Chancery.



Silas D. Canfield, being duly sworn according to law, deposeth and saith, that he was employed by Cornelius C. Zabriskie, to procure from the legislature a law for widening the bridges on the Passaic river, and that he attended the legislature as counsel and finally procured the passage of the law entitled "An Act regulating the draws of the bridges now erected or to be erected over the Passaic river," passed February 24th, 1843.

That the principal object they had in view, was to compel the widening the draws of bridges on said river. That there was an objection to the draw on the railroad bridge at Acquackanonck, being so near the bank, and it was then deemed best for the purposes of navigation, that the draw should be in the middle of the river, but the great object was to have the draws widened. And this deponent further saith that no objection was made to the draw being made at right angles to the bridge.

SILAS D. CANFIELD.

Sworn and subscribed this 17th day of November, A. D., 1852.

WILLIAM GLEDHILL,
Master in Chancery.

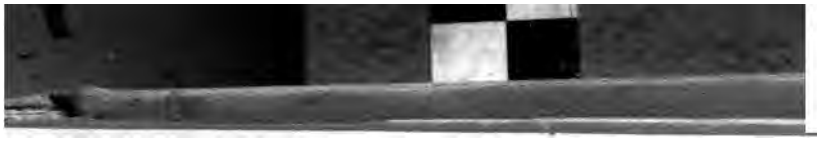
Thomas Addis Emmet, being duly sworn according to law, deposeth and saith, he is superintending engineer and superintendent for the New York and Erie Railroad Company, of the road between Jersey City and Sufferns. Deponent has charge of preparing the plans and of constructing the road, bridges, and works connected therewith. That at Passaic bridge deponent made a contract in writing, for the Erie Railroad Company, with Campbell & Moody of New York, for building the coffer dams and driving the foundation piles for the piers proposed to be built in the Passaic river. That this contract was made about the 10th day of October last and before deponent heard of any objection to the proposed draw; and said Campbell & Moody have proceeded under their contract, and have driven most of the foundation piles, and have nearly completed one cof-

fer dam, and have nearly half completed the other; and the company has made a contract, in September last, with F. C. Beckwith to furnish the stone and build the masonry of the piers in the Passaic river, and under this contract he has delivered a good deal of stone, and some of it has been dressed according to the plans of the proposed piers. The plan proposed is to make the opening for the draw forty-five feet wide at low water mark, and forty-seven feet wide at the grade line of the rails. The piers for draw proposed are at right angles to the bridge as it now stands, and in a parallel line with the present draw and with the present abutments. That if the piers proposed should be built at a different angle from those now proposed, the abutments will have to be taken down and built at an angle to correspond with the piers. That the expense already incurred, if the work should be changed, is between two and three thousand dollars, exclusive of damages which might be claimed by the contractors, and exclusive of the cost of taking down and re-building the abutments. That the bridge is to rest upon the abutments and the two stone piers proposed to be built. That the bridge is now in a bad condition, and any alteration in the building of these piers would delay the re-building longer than it would to carry out the present plans. That the first objection he heard to the plan proposed, was on the 25th October last, when considerable work had been done at driving the piles and making the coffer dams. That the company have offered, and are willing, to make fenders at each end of the piers, and to place them at such an angle, and in such a way, as the complainants may desire.

THOMAS A. EMMET.

Sworn and subscribed before me, this 17th day of November, A. D., 1852.

S. D. CANFIELD,
Master in Chancery.



The argument for an injunction was heard before the Chancellor, at Trenton, on the 22d November, 1852.

William Pennington and *Joseph P. Bradley*, Counsel for the complainants.

Aaron S. Pennington, Counsel for the defendants.

THE CHANCELLOR. I have no doubt of the power of the court to interpose in this case by injunction; nor of the propriety of its exercising that peculiar jurisdiction, if, as is alleged, the defendants, under and by virtue of the power of the legislature, conferred upon "the Paterson and Hudson River Railroad Company," to bridge the river Passaic, are obstructing the navigation of that river, in violation of the provisions of the act from which they derive their authority.

The location of the bridge in question is several miles below the head of navigation, where the tide ebbs and flows, and where the river is navigable for sailing vessels of tons burthen, and for small steamboats.

The power of the legislature to grant the right of constructing the bridge is admitted. The only issue is, whether the defendants are exercising the right, within the limits prescribed by the legislature, and, if they are not, whether this court can and ought to interfere?

"The Paterson and Hudson River Railroad Company" is a creature of the legislature. If it is exercising its franchises in a manner not authorized by the law which gives it existence, and so as to destroy or impair the common rights of the citizens in this navigable river, it is the duty of this court—the only court of the state which can apply an adequate remedy for the mischief—to restrain the defendants in the commission of the injury.

On behalf of the defendants, it is insisted, that if the construction in the river for the purpose of the bridge, is not in conformity to the law, then it is a question of *nuisance*—a question which should be either referred to the

courts of common law or submitted to a jury, under the direction of this court, as a matter of fact.

If the ground upon which the interference of the court is invoked depends upon facts, of dispute and doubt, involving the credit of witnesses conflicting in their testimony, the weight due to opposing opinions, and the exercise of a discriminating judgment as to facts and circumstances, and the opinions of witnesses—this court ought not, and especially in cases of magnitude, to conclude the rights of a party without the intervention of a jury.

In this case, the complainants have sought the jurisdiction of the court, and submitted to its decision the law and facts. As for the defendants, with the view I have taken of the facts, they require no other tribunal for their protection.

I shall decide the case upon the bill with the affidavits accompanying it, and the affidavits, read in reply, on behalf of the defendants. No question was made, on the argument, as to the manner in which the case is presented on either side, and in that respect I am free from embarrassment.

The complainants allege, that the defendants are about re-constructing their bridge over the Passaic river, near Acquackanonck; that, in doing so, they propose to alter the position of the draw in the present bridge, and to place under the same a new set of stone piers near the centre of the river; the draw to be placed between the said stone piers. That the piers are intended to be, each from seven to eight feet broad, and of the width of the bridge, as the same shall be widened, to the extent of several feet beyond that of the present bridge; that it is proposed to place the said piers diagonally across the river, and at right angles with the bridge, and not with the current of the stream; that these stone piers are substituted for the wooden piles heretofore used, and that placing the same in the position intended will materially impede navigation, and not being in the line of the current of the river, must render extremly dangerous, if not impracticable, the navigation o



the river with vessels navigating the same. They deny the right of the defendants to place the stone piers in the river, or to build the bridge with the draw in the manner contemplated, on account of the same being unnecessary obstructions, not contemplated by the charter of "the Paterson and Hudson River Railroad Company." The complainants pray that this court may decree, that the defendants have no right to place the stone piers and draw in the river in the manner proposed, and that they may be enjoined from carrying out their plans as contemplated.

By the act incorporating "the Paterson and Hudson River Railroad Company," passed the 21st day of January, 1831, it is enacted, "that the company shall have the privilege and authority to erect, build and maintain, on the rivers Passaic and Hackensack, respectively, such wharves, piers, bridges and other facilities as they may think expedient and necessary for the full enjoyment of all the benefits conferred by their act of incorporation." The dimensions of the draws, or the manner of constructing them in the bridges, are not prescribed by the act; but provision is made for keeping lighted lamps at the draws for the safety of vessels navigating the river.

By a supplement, passed January 21st, 1831, the width of the draw in the bridge over the *Hackensack river* is prescribed, with directions that it shall be placed *in a line with the course of the river*.

Under the provisions of these acts, the company constructed their road from Paterson to the Hudson river, and in the years 1832 and 1833, erected bridges over the rivers Passaic and Hackensack. In the bridge over the Passaic, they placed, near the western shore of the river, a draw, at right angles with the bridge, and twenty-six feet in width.

On the 10th of March, 1842, an act was passed, entitled, "An act for the better protection of the navigation of the Passaic river," by which it was enacted, "That each and every bridge or viaduct, hereafter to be erected over the Passaic river between the head of navigation and the Newark bay shall be so constructed as to contain a draw

for the free passage of vessels navigating the said river, the opening of which draw shall be at least thirty-five feet wide in the narrowest part, and shall be placed in such position as to do the least possible injury to the navigation thereof."

This last act was repealed by an act of the 24th of February, 1843; but, at the same time, the act of 1842 was re-enacted, with some additional provisions, not necessary, for our purpose, to mention.

The company widened their draw, in conformity to the requirements of this act, to thirty-five feet or more. Its position in the river, or as to the bridge, was not changed.

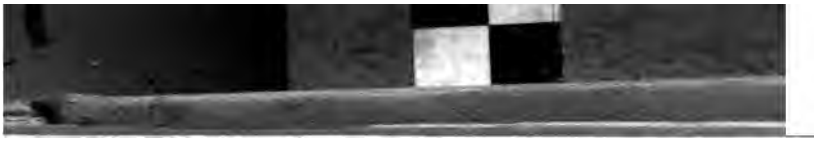
The draw now contemplated is to be forty-five feet in width. It is to be placed in the middle of the river, and, like the present draw, is to be at right angles to the bridge. The change of its position from the side to the middle of the river and bridge, is not objected to. The position proposed, it is admitted, is more advantageous than the old one. The water is deeper at the new location, and it obviates difficulties which vessels have had to encounter at the present draw, in consequence of its proximity to the shore.

But it is insisted that the contemplated draw should be placed *in a line with the course of the river*, and not diagonally to it; and that if it is not, its position will not be such as is required by the law of 1843, "so as to do the least possible injury to the navigation thereof."

It will be observed that the act does not, *in terms*, require the draw to be placed in a line with *the course of the river*. But if that position is the one *to do the least possible injury to navigation*, the draw must be so placed, in order to answer the requirement of the last mentioned act.

The language of the act differs from that of the act of the 21st of January, 1831, in reference to the bridge over the Hackensack, which requires, *in terms*, the bridge on the latter river to be placed "in a line with the course of the river."

Is there such evidence before the court as proves, with any reasonable certainty, that the position of the draw, as contemplated, is not such as will do the least possible injury to



the navigation of the river, and such as will justify the court in interfering with the works of the defendants?

The affidavit annexed to the bill is that of Zackariah Keasler, who swears that he is the captain of a vessel plying on the river, and that he has been engaged in boating on the Passaic for upwards of twenty years; that he has examined the works in progress of erection for a draw; that the position of the draw being diagonal to the current, and not in the line of the stream, will make the passage of vessels through the said draw difficult and dangerous at most times; that in time of freshets, which are of frequent occurrence, and, with certain winds, the passage will be impracticable, and that the draw should be *on a line with the current and course of the river*, and not at right angles to the bridge.

Thomas Pettit is the master of a schooner navigating the river. He testifies, that the location of the draw being at right angles with the line of the bridge, and consequently crossways with the current and line of the river, will make the passage through it dangerous and hazardous at all times; and, under certain and frequent circumstances, such as freshets and certain winds, impracticable without sustaining serious damage; that the line of the draw should be in a line with the river and the current of the river. He adds, "the fact of its present construction being placed as above stated, I consider the greatest obstruction to the navigation of the said river that could be conceived or imagined, and entirely unnecessary."

Henry Crawford is master of a schooner navigating the river. His affidavit is very much in the language of Pettit's, and corroborates his statements.

It is thus seen, that, in the opinion of these witnesses, the position of the proposed draw is very far from being such "as to do the least possible injury to the navigation of the river."

Is this opinion well founded? Is it based upon such reasonable considerations, and upon such facts, as to entitle it to the weight of evidence which ought to influence the judgment of the court, and govern its decision?

It is important to notice that these witnesses speak of the "current of the river," the "line of the river," the "current of the stream," and the "course of the river," as synonymous.

The "course of the river" is a line parallel with its banks. The "*current* of the stream" will vary from the general "course of the river," depending upon a variety of circumstances. Short bends in the river will drive the current diagonally from one bank to the opposite bank. Exposure to the winds on one side, and the protection afforded by high banks on the other, will produce the same effect. The character of the bed of the river must necessarily greatly affect its current. The map exhibited in this case illustrates this. The channel of this river, its current, and its general course, are all in different directions; and, if the map is to be relied on, it shows conclusively that no draw could be constructed at right angles with any two of them.

Benjamin B. Aycrigg, a witness on behalf of the complainants, gives us the results of his observation and experiments. The position of the draw is south forty-six degrees forty minutes west; the direction of the current is south twenty-five degrees west; but this was fixed with some uncertainty at a low tide, and by an experiment not very satisfactory. The general course of the river is south twenty-nine degrees west. The channel, for the distance of half a mile in the vicinity of the bridge, varies very considerable from the general course of the river, and from the current, as indicated by the experiment made by Mr. Aycrigg.

It is manifest from these observations and experiments, that it is impossible to place the draw in a line at right angles with the *current* and *course* of the river. As the witnesses treat "the course of the river" and "the current of the stream" as the same, and, as the bridge cannot be placed at right angles with both, their opinion, as to what is the proper position for the draw, is very uncertain.

Keasler thinks the draw should be "in a line with the current and course of the river."

Pettit, that it should be in a line with the river and the



current of the river, and "the draw not being so is the greatest obstruction to the navigation of the river that could be conceived or imagined." These witnesses require impossibilities.

It was the opinion of one of the complainant's counsel, on the argument, that it was more important to have the draw at right angles with the general course of the river, than at right angles with the current, and yet the complaint in the bill is, that it is not at right angles with the current.

But on what do the witnesses found the opinions they have advanced? They are navigators, and have been engaged as such on this river for a number of years. Are their opinions mere matters of speculation? What has been the teaching of their experience?

For the last eighteen years there has been a draw on this very bridge. Its position, as to the current and course of the river, is precisely similar to the one in contemplation. For a portion of the time it has been ten feet narrower, and the residue of the time nearly twenty feet narrower than the one proposed. Its position has been so near the west bank of the river as to require *fenders* to protect boats passing through from being driven against the adjoining bank.

The witnesses of the complainants, who must, of necessity, have passed frequently through the present draw, in order to reach Acquackanonck, the point to which they were navigating, could tell us with certainty, what difficulties must needs be encountered with a draw in such a position. What effect has the present draw had for the last eighteen years on the navigation of the river? How have vessels in passing through been affected by the current crossing diagonally? How do actual experience and daily experiments, correspond with the opinion of the witness who says, "that the passage through the contemplated draw will be dangerous and hazardous, and, under certain and frequent circumstances, such as freshets and certain winds, impracticable without sustaining serious injury." Such cannot be the consequences as to the contemplated draw, so much more favorable in every respect

both as to location and dimensions, unless they have been experienced in the present draw.

It may be said that the opinions advanced are the results of experience. The witnesses do not say so. They express them as mere speculative opinions. If their opinions are correct, they might have proved them. Facts might have been and ought to have been substituted for opinions. A reference to the dangers and difficulties encountered at the present draw; to the disasters that must have been frequent if their opinions are correct; to facts, as to the effect produced by the current upon vessels passing it—would be more reliable than the mere *opinions* of a hundred witnesses.

The present draw is a *test* of the most satisfactory and conclusive kind, as to the effect of a draw placed at right angles with the bridge.

What does that test prove? It ought to govern us.

Silas D. Canfield, a witness of the defendants, was the counsel who appeared on behalf of the navigators, to procure the act of the 24th of February, 1843. He says:—"The principal object they had in view was to compel the widening of the draw of bridges on said river; that there was an objection to the draw on the railroad bridge, at Acquackanonck, being so near the bank, and it was then deemed best for the purposes of navigation, that the draw should be in the middle of the river, but the great object was to have the draws widened, and no objection was made to the draw being made at right angles to the bridge."

Philip Van Bussum, another witness, says:—"That he has known the railroad from Paterson to Jersey City ever since they commenced building it; and has been in the employ of the Paterson and Hudson River Railroad Company for about eighteen years; that the railroad bridge erected at Acquackanonck was built in 1832 or 1833, and that the draw in said bridge, as first made, was at the same place as it now is, except that it has been widened; that the bridge crosses the river at that place diagonally, and that the draw was built at right angles to the bridge; that it was built near the Passaic shore; that he worked on the bridge when the draw was



widened, and helped to drive the piles; that he has never heard any complaint of the draw except that it was too near the shore, and the company built a fender to keep the boats from running on the shore; *that he never heard any complaint of the angle at which the draw was made in the river;* that he has been all the time in the employ of the company, engaged in the repairs of the road and bridges, and for the last three years has had the entire charge of the bridges, and from his position in the company, he thinks, he would naturally hear of any complaints against the draw; that at the time of the application to the legislature, to compel the widening the draws of bridges over the Passaic, he never heard of any complaint of the angle of the draw."

With this evidence, and in the absence of all testimony of inconvenience, even in the present draw, am I not bound to conclude, that the opinions of the complainants' witnesses are proved to be incorrect, by this test and experience of eighteen years?

Can it be doubted, that if the company had attempted to erect a draw in any other position than the present one, it would have been considered an experiment which this Court would be bound to prevent?

But the bill further alleges, that the stone piers will be obstructions to the navigation; that they are unnecessary, either as sides to the draw, or as supports for the bridge; and the court is asked to interpose and prevent their erection in the river.

Not a witness ventures the opinion that they are unnecessary, or will do any injury to navigation. They are not mentioned or alluded to in any of the affidavits produced by the complainants.

It may be they are unnecessary; it may be they will greatly obstruct the navigation. But I cannot act upon assumptions. The fact that no allusion is made to these piers by the witnesses examined, show, either that the complainants did not consider them of sufficient consequence for serious notice, or that the witnesses were unwilling to say that they were obstructions, or were unnecessary.

If an injunction is granted to restrain the erection of the piers, it must be done upon the mere allegations of the complainants as to their injurious tendency. It is reasonable to conclude, that the piers will add very much to the safety and permanency of the bridge. It would be assuming a great responsibility for this court to interfere with their erection, and to compel the defendants to support their bridge by wooden piles.

Upon a careful review of the whole case as it is before me, I have come to the conclusion that the complainants have failed to establish the case presented by their bill.

The injunction is refused, but without costs. The order is made without costs, because the subject matter of the bill is one in which the public is interested, and because, I am satisfied, that the complainants filed their bill in good faith, and not for the purpose of harrassing the defendants. The suit has been conducted with a commendable spirit on both sides, and with a disposition to have the questions involved, presented and decided without unnecessary embarrassment.

POTTS, J. The bill in this case was filed at the relation of persons interested in the navigation of the Passaic river, in the counties of Bergen and Passaic. The complaint against the defendants is that they propose to alter the position of the draw of the bridge over the Passaic, which crosses south of the town of Acquackanonck, and to place under the same a new set of stone piers near the centre of the river, the draw to be placed between the said stone piers; that the said piers are intended to be each from seven to eight feet broad, and of the width of the bridge, as the same shall be widened to the extent of several feet beyond that of the present bridge; and that they propose *to place the said piers diagonally across the river* and at right angles with the bridge, *and not with the current of the stream;* that heretofore there has been no stone piers to the said bridge, but the same is supported by wooden piles and shore abutments of stone; that the placing of the said stone piers would materially impede the navigation of the said



river, and *not being placed in the line of the current of the river* must render extremely dangerous, if not impracticable, the navigation of the river with the vessels now navigating the same, &c., and they say that by reason of the obstructions in the said river a short delay in getting through the said draw may, and no doubt often will, occasion a much longer hindrance, in preventing vessels from passing the said obstructions at the high tide, and that the stone piers will of necessity prevent all vessels coming into the draw from having the advantage of the wind to carry them through, which is essential to their progress, and will necessarily produce eddies in the wind; and that it seems to the relators that it will not be in the power of the steam tow boat (which one of them is building) to tow any vessel through the said draw, which is designed to constitute a part of its regular business. And the bill therefore prays an injunction, &c.

Appended to the bill are several affidavits, besides that of the relators.

Zackariah Keasler testifies that he is the master of a vessel; has been engaged in boating on the Passaic river upwards of twenty years; that he has been master of a vessel some fifteen years last past; that he has examined the works in progress of erection for a draw in the railroad bridge across the Passaic river immediately below Acquackanonck; that the position of the draw *being diagonal to the current and not in the line of the stream* will make the passage of vessels through the said draw difficult and dangerous at most times; that in time of freshets, which are of frequent occurrence, and with certain winds, the passage will be impracticable.

Thomas Pettit, another master of a vessel trading on the Passaic, says, "the location of that draw *being at right angles with the line of the bridge* and consequently *crossways with the current and line of said river*, will make the passage through said draw dangerous and hazardous at all times, and under certain and frequent circumstances—such as freshets and certain winds—impracticable without sus-

taining serious damage. The line of the draw should be in a line with the river and the current of the river, and the fact of its present construction being placed as above stated, I consider the greatest obstruction to the navigation of said river that can be conceived or imagined, and entirely unnecessary."

Henry Crawford, also the master of a vessel running on the river, says, "the placing of the said draw in the middle of the bridge and said river, at right angles with the line of the bridge, and consequently the line of said draw for the passage of vessels *across the line of current of said river*, would be not only a very serious obstruction, but in many respects ruinous to the navigation of said river, dangerous and hazardous for vessels to pass at all times, and under favorable circumstances; and when the water is high, under the influence of freshets, which we are subject to very frequently throughout every season, and when the current by means of such freshets is running at an increased rate of rapidity, and very often for several days in succession, it would be to a very great extent impracticable, and decidedly imprudent to attempt a passage through said draw under any circumstances."

A map is exhibited showing the course of the river and the position of the bridge and draw as contemplated to be erected, from which it appears that although the draw is proposed to be forty-five feet in width, yet as the bridge crosses the river diagonally and the draw is to be at right angles with the bridge, it affords but about twenty-four feet six inches clear width, to a boat keeping the course of the river as indicated by its banks.

This is substantially the case made by the relators.

The defendants on the other hand read affidavits to show that ever since the bridge was originally erected in 1832 or 1833, the draw has been at right angles with the bridge, and much nearer the shore, and of less dimensions; that they never heard any complaints of the old draw, except that it was too near the shore; and that taking the line of the deepest water in the river as indicating the course of



the current, the proposed draw will be in a line with the actual current of the river.

It appears on the part of the complainants, then:—First, That the defendants have erected their bridge in a diagonal line across the Passaic river, and propose to construct the piers for their new draw at right angles with the bridge. Second, That the place where the bridge crosses is below the head of navigation. And Third, That in the opinion of the witnesses most intimately acquainted with the navigation, the *proposed mode* of constructing the piers and draw will seriously obstruct the navigation. And the object sought by the relators is to obtain a temporary injunction to restrain the company from proceeding until the question can be fully inquired into and satisfactorily settled.

In the first place let us see what are the terms and extent of the legislative grant to the defendants, under which they claim the right to construct and maintain this bridge and draw.

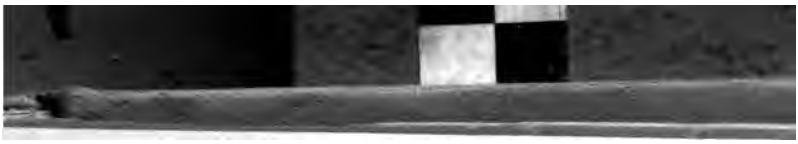
By the thirteenth section of the charter of the company, 1 *Har. Comp.* 324, they are authorized to build and maintain on the rivers Passaic and Hackensack, wharves, piers, bridges, &c., and they are to keep the same properly lighted, and cause to be kept at the bridge over the Hackensack, a careful person to open the draw for the *free passage of vessels with standing masts;* the seventh section of the act had already provided that they might cross the *Hackensack* river upon or adjoining the bridge belonging to the new Barbadoes Toll Bridge Company with their consent, but if such consent could not be obtained, then as near the said bridge as practicable, with a draw *in a line and corresponding* with the present one, and of equal or greater width.

It seems that the company did not propose at the time they obtained the charter to cross the Passaic below tide water, and therefore no provision was made for a draw in that bridge, but the proposed route having been changed by a supplement of the 18th November, 1831, making it necessary to cross that river below tide, the provisions and requisitions of the thirteenth section of the original charter

were made applicable as well to the bridge to be constructed over the *Passaic* as to that over the Hackensack, and at the same time more particular provisions were made in reference to the Hackensack bridge, which it is unnecessary here to notice.

Subsequently, in 1842, *Pamp. L.* 139, an act was passed for the better protection of the navigation of the Passaic river, which was repealed and supplied by another act passed in 1843, *Pamp. L.* 117. This last act directed "that each and every bridge or viaduct hereafter to be erected over the Passaic river, between the head of navigation and Newark Bay, shall be so constructed as to contain a draw for the free passage of vessels navigating the said river, the opening of which draw shall be at least thirty-five feet wide in the narrowest part, and *shall be placed in such position as to do the least possible injury to the navigation thereof;*" and "that every bridge now erected over said river, not having a draw at least thirty-five feet wide, shall, by the first day of May next, be so altered as to contain a draw of the dimension and description" above specified.

It is admitted that the defendants complied with the directions of the act last mentioned, so far as to make their old draw of the width prescribed, and so far acquiesced in it. But whether they had done so or not, there can be no doubt that the act is binding upon the company. It violates no vested rights granted them by their charter as originally passed, or by the supplement of 1831. They had no authority by virtue of those acts to interfere unnecessarily with the navigation of the river. A grant in general terms to an incorporated company, of authority to build a draw bridge over a navigable river, always implies that the bridge shall be so constructed and the draw so placed as to do the least possible injury to the navigation. The right of navigation is a pre-existing public right—and all grants of special privileges are to be construed strictly against the grantees and liberally in favor of the public; and he who claims authority to impair or obstruct this right by legislative grant,



must show it by the clear and explicit terms of the grant itself, or at least by necessary implication. *Att'y General v. Stevens et al.*, *Saxton* 383; 4 *Mass. R.* 145. The act of 1843 only declares what shall be deemed a sufficient width of draw, and prohibits in effect any unnecessary interference with the navigation.

I cannot see, therefore, that the grave question, whether the legislature of a state has the power to authorize an obstruction to be placed in a navigable river within its own limits, is involved in this case. The legislature have exercised no such power. When that question comes up it will be time enough to settle it. The erection of bridges over rivers, with proper draws, so constructed and placed as to do the least possible injury to the navigation has never been held to be a nuisance. The slight, but unavoidable obstruction which such bridges occasion is a necessary evil which must be borne for the sake of the public good which demands it. It belongs to the same class of inconveniences as those to which the traveling public are every where subjected in the crossing of public highways by canals and railroads. The relators do not complain of the bridge or the draw; but only of the position in which the draw is proposed to be placed. Nor do I understand that any serious complaint is made that the piers are to be of stone, provided the objection as to their position in the river is obviated.

It is clear, then, that the whole extent of the company's right is to maintain a bridge with a draw at least thirty-five feet wide in the narrowest part, and placed in such position as to do the *least possible injury to the navigation of the river*. And the complaint is that they are about to construct the piers, not in a line with the course of the river as indicated by its banks, but *diagonally across the same*, so that they will be at right angles with the line of the bridge; and that placing the piers and draw in *the proposed position* will render the navigation extremely dangerous, if not impracticable, with the vessels now navigating the river.

Now, there is no dispute about the fact that the company do propose to place the piers and the draw of the bridge in

the position mentioned; and the whole question in the cause is, whether or not that is the position which will do the least possible injury to the navigation? The complainants allege it is not—the defendants insist it is.

The difficulty in the mind of the Chancellor, and which induced him to deny the injunction prayed for, was, that the case of the relators was based upon *opinions*, rather than facts, deduced from actual experience; and that opposed to these opinions evidence was produced, as before mentioned, that the first draw erected by the company near the shore, was constructed in the same diagonal position to the course of the river as indicated by its banks, as was proposed for the contemplated new draw; that no complaints had been made of that, except that it was too near the shore; and that the position of the new draw, as proposed, would be actually at right angles with the *current* of the river, as indicated by the bed or deepest channel of the same.

But, with great respect for the judgment of the learned Chancellor, I think a sufficient case is made for a preliminary injunction.

I know it is said that courts of equity will grant an injunction to restrain a nuisance, *only* in cases where the fact is clearly made out, upon determinate and satisfactory evidence, and that if the evidence be conflicting, and the injury to the public doubtful, that alone will constitute a ground for withholding their extraordinary interposition. 2 *Story's Eq. Jur.*, *sec.* 924. But it is often necessary, in order to ascertain the extent and application of a principle, to look to the cases from which it is derived; and in this instance not one of those cited by Mr. Justice Story bears the slightest analogy to the case now before the court. The *Earl of Ripon v. Hobert*, 3 *Mylne & Keene*, 169, was a bill to restrain certain parties from using steam engines in draining low lands under their management by throwing the water into the river Witham. The drainage had been formerly managed by wind mills, and it was apprehended that the rapid process of the steam power application would endanger the banks of the river. Voluminous affidavits were



taken on both sides, extending to seven sets, and containing the representations of opinions, with the facts or alleged facts and reasons on which they rested, found by skillful professional men as well as other persons chiefly directed to determine the question, whether any use that could be made of the engine proposed to be erected would prove detrimental to the banks, &c. And the Chancellor said that in the *conflict of opinions* in the case, it was impossible for any one to tell beforehand whether damage would ensue or not. The defendant was making an untried experiment, and the Chancellor left him to prosecute it at his peril. The *Anonymous* case cited from 1 *Vesey, jr.*, 140, was an application to restrain the defendant from prosecuting further the digging of a ditch, and the Chancellor did restrain him from proceeding further until he answered. The *Att'y Gen'l v. Doughty*, 2 *Vesey, sen.*, 453, was a bill for an injunction against stopping the complainant's prospect, and the court said that it was very doubtful whether the bill could be maintained for trial, and at any rate he would not interpose before answer. The *Att'y Gen'l v. Nichol*, 16 *Vesey*, 338, was a question of stopping ancient lights for which an action at law had been commenced, and the court refused to interfere until that suit was tried. The *Att'y Gen'l v. Cleaver*, 18 *Vesey*, 211, was a bill to restrain a defendant from manufacturing soap, and a preliminary injunction was granted, but subsequently dissolved on the hearing, as the complainant had sought his remedy at law. And *Mack v. Wyatt*, 3 *Merivale*, 688, was a bill to restrain defendant from digging near the complainant's bank, and the injunction granted on the ground that the question as to the right had been established at law. Here are the English cases cited; and they go no further than the perfectly familiar doctrine that equity will not ordinarily interfere in cases of nuisance where the complainant has a perfect remedy at law. *Att'y Gen'l v. N. J. R. R. Co.*, 2 *Green's Ch.*, 140.

In regard to public nuisances, says Justice Story, the jurisdiction of courts of equity seems to be of very ancient date, and has been distinctly traced back to the reign of

Queen Elizabeth. The jurisdiction is applicable not only to public nuisances, strictly so called, but also to purprestures upon public rights and property, as public rivers, &c. 2 *Story's Eq., sec.* 921. And the *State of Pennsylvania v. Wheeling Bridge Co.*, 13 *Howard*, 518, is a memorable case not only in support of the authority of the court to interfere, but to show the importance of its early exercise, as a preventive remedy, in cases where obstructions to a public navigation are about to be erected, which, when erected, can only be removed at very great expense and sacrifice. Indeed the case in 2 *Green's Ch.*, 140, above referred to, goes so far as to hold, that when the obstruction has been completed, the thing complained of is done, the remedy by injunction, which is in its nature preventive merely, is gone.

Now the defendants here are about to erect stone piers in the middle of the Passaic river to support their draw. It is intended to be a permanent structure and to be erected at great expense. The bridge is a railroad bridge on a line of great and increasing travel. If the position in which it is contemplated to place these piers and this draw is *not* the one which will do the least possible injury to the navigation, nothing is clearer than that it is of the last importance, even to the defendants, that they should know it *now;* and it is scarcely less certain that just in proportion to the expense of the work, the difficulty of removing it after it is finished, and the inconvenience, perhaps danger, to the traveling public, which would ensue from the process of removal, will be the delay and vexatious litigation to which the navigation of the river will be subjected in effecting it.

The object of the relators is to anticipate the mischief by stopping the work *in limine*. They ask a temporary injunction until the question as to whether this is the right position for the piers and draw can be examined and settled, either by the Chancellor or by a reference to a master, to commissioners, or to a jury.

In the first place it strikes me as a strong fact in this case, that the defendants are about to place this draw in an unusual and unnatural position. The natural position of the



piers would be on a parallel line, and the draw at right angles, with the course of the river as indicated by its banks; and it requires no science or experience to determine that however the river may wind about in its bed at very low water, as a general rule when it is high the course of the banks are the surest indication of the course of the stream. The proposed position is, that which is most convenient to the bridge company, being at right angles with the bridge which crosses the river diagonally. If the bridge had crossed the river at right angles, it is hardly probable the company would have thought of placing the draw diagonally.

Then in the second place, not only are the charges of the bill explicit but they are supported by affidavits conclusively showing what, in the judgments of persons best able to form an opinion, the effect of the proposed erection will be. True, we have only their *opinions*, but they are the opinions of experts; men thoroughly acquainted with the practical business of navigating this river. Questions of this character must always depend upon such evidence. The proposed piers and draw have no actual existence—there can be no experience in reference to that which has no existence; and consequently we could not, in the nature of things, have the evidence of facts deduced from experience, in support of the complainant's case. To lay down the rule that such evidence is indispensable, would be to say, that no injunction could ever issue to stop a party from erecting an obstruction of this character in a navigable river, because until the thing was done there could be no experience of its effects, and when the thing was done, according to the case in 2 *Green's Ch.*, 140, it would be too late.

These opinions go to the very point of the question in controversy. If these practical navigators are right, the defendants' proposed piers and draw would be a nuisance—an invasion of the relators rights, and without color of justification under the charter of the railroad company. But the defendants had an opportunity afforded them of meeting this testimony and overcoming or shaking it if they

could. They have not done so. Not a single practical navigator was called by them—not a single conflicting opinion adduced of any man having any practical acquaintance with the navigation of this river. A fair inference therefore is, that none such could be had; and if this be so, then the whole mass of practical opinion is against the defendants.

I do not attach much weight to the fact, if it be so, that no complaint was ever made of the position of the old draw, except that it was too near the shore. Its location on one side of the river was complained of, and that location may have been the very reason why the present objection did not apply to it. Here is a new draw proposed in a different location, in the middle of the river, and to be constructed with stone piers—and these considerations I think make it a new question. Nor is it a satisfactory answer to the difficulties suggested by the relators, in regard to the diagonal position of the new draw, that the line of deepest water corresponds with it. The principal danger in the navigation by reason of the proposed piers, it is alleged, will be in times of high tide and freshets, and the depth of the channel will not control the course of the current on such occasions, but the stream will pursue the course of the banks.

There is no hardship in this case. The defendants had early notice that their right to place their piers and draw as proposed by them would be contested. The question to be ascertained is, in what position these works should be placed to do the least possible injury to the navigation, and the relators manifest every disposition to speed the cause so as to have the question settled without delay.

I think the order of the Chancellor, refusing the injunction, should be reversed, and that the cause be remitted to be proceeded on in conformity with the opinion of this court. But I think the injunction asked for should extend no further than to restrain the defendants from erecting their proposed piers and draw in the position proposed by them.



until the question whether that is the proper position can be determined.

HAINES, J., concurred in the above opinion.

The decree of the Chancellor was reversed by the following vote:

For affirmance:	For reversal:
GREEN, C. J.,	HAINES, J.,
ELMER, J.,	POTTS, J.,
RISLEY, Judge.	ARROWSMITH, Judge,
	HUYLER, do.
	VALENTINE, do.
	WILLS, do.

COURT OF ERRORS AND APPEALS,

NOVEMBER TERM, 1853.

RALPH V. M. COOPER, Appellant, and WILLIAM M. COOPER, Respondent.

A testator by his will appointed his cousin and the defendant his son, the guardians of the complainant, with directions to educate and maintain him out of the estate given to the complainant by the will. On the complainant's arriving at the age of twenty-one years, the defendant and his sister were to pay to the complainant, out of their own estate, the sum of one hundred dollars each. The complainant claimed that sum, with interest, from the time he arrived at the requisite age. The defendant alleged that since that time the complainant, for a valuable consideration, had executed a release under seal, by which he released and discharged the defendant of, and from, all actions, suits, demands, and claims whatsoever, which the said complainant then had, ever had, or could have against the defendant *as his guardian*.

Held: that the release did not cover the claims.

That although the defendant set up in his answer, that he took the benefit of the bankrupt law, and had received his discharge from the District Court of the United States, he could not avail himself of this defence, because he had not proved it. It was unnecessary therefore to decide the question discussed on the argument: whether the character of the debt was such as to exclude it from the operation of the bankrupt law?

The complainant and defendant with their sister were tenants in common of the lands in question, each entitled to an equal third part of the same. The land had been in the possession of tenants and had been impoverished by improper cultivation—the fences were dilapidated, and the buildings had been permitted to go to decay. In this situation of the premises the defendant went into possession of them, rebuilt the houses, renewed the fences, and renovated the land. The sister then conveyed her interest to the complainant. A division was made between the complainant and defendant by agreement, and releases exchanged. *Held:* that the complainant was entitled to one-third of the rents and profits from the time the defendant entered into possession up to the time when the sister made the conveyance, and from that period until the defendant delivered up possession, to two-thirds of the rent. And that a proper allowance should be made to the defendant for the permanent improvements put by him on the premises.



The bill was filed December 24, 1849. A demurrer to the bill was overruled for not having been set down for hearing according to law.

An answer was filed December 17, 1850, and a replication, December 24, 1850. Proofs were taken on both sides.

The bill calls for the defendant to account for one hundred dollars and interest on that sum from the time the complainant arrived at the age of twenty-one years, and which by the will of the father of the complainant and defendant (they being brothers), the defendant was charged to pay him as a condition of the devises and bequests in the will made to him.

The bill also calls upon the defendant to account for the rents and profits of the real estate mentioned in the bill, charged as having been in the occupation of the defendant.

That the said land was held by the complainant and the defendant together with their sister, Sarah Ann Lee, as tenants in common and holding in fee one equal undivided third part—that on the 25th July, 1848, Sarah Ann conveyed her interest to the complainant—that on the 20th March, 1847, and before the sale of Sarah Ann aforesaid, the defendant took possession of the land in question—that on or about the 13th day of October, 1848, the complainant and defendant entered into a written agreement by which they appointed three persons commissioners to divide the said lands by metes and bounds, according to a line, or divisions thereof, agreed upon by the parties thereto, and to value and appraise the respective shares, and to settle to whom, and how, the difference in the valuation of said shares was to be paid, as in and by the said agreement expressed. That on the 1st day of November, 1848, the said commissioners, by writing, under hand and seal, did make the division, and did determine that the defendant should pay to the complainant two thousand one hundred and fifty dollars on or before the 10th of January then next, and that then mutually releases should be exchanged—that in pursuance of said report, releases were exchanged on the 16th of March, 1849, but that, notwithstanding, the defendant continued to hold

the possession of the said premises up to the 7th day of November, 1849.

An account of the rents and profits is prayed.

No objection was made to the form of the bill either in the pleadings or at the hearing.

Mr. *Dudley* for complainant.

Mr. *Mulford* for defendant.

THE CHANCELLOR. The complainant and defendant are brothers. Their father, who died in 1835, by his will directed, that the defendant, as a condition of certain devises and bequests made to him in the will, should pay to the complainant, then a minor, on his arriving at the age of twenty-one years, the sum of one hundred dollars.

The complainant was twenty-one years of age on the 4th of December, 1844. He claims the one hundred dollars, and the interest from that date.

The defendant resists payment upon two grounds.

First,—He alleges, that on the 23d of August, 1847, he, as the guardian of the complainant, by virtue of such appointment by the will of their father, had a final settlement with the complainant, and that in consideration of two hundred and twenty-five dollars, then paid him, the complainant executed a release, under seal, by which he released and discharged the defendant of, and from, all actions, suits, demands, and claims whatsoever, which the said complainant then had, ever had, or could have against the defendant, as his guardian.

The release does not cover this claim.

Benjamin B. Cooper, by his will, appointed one Benjamin Cooper, his cousin, and the defendant, his son, the guardians of the complainant, with directions to educate and maintain him out of the estate given to the complainant by the will. On the complainant's arriving at the age of twenty-one years, the defendant, and his sister, Sarah Ann, were to pay the complainant, out of their own estate, the sum of one hundred dollars each.



The release does not embrace technically, nor in its spirit, the claim in question. There is nothing in the pleadings, or proofs, to show that it was the intention of the parties to the release, that it should embrace any other claims between them, or claims in any other right, than the legal technical construction of the instrument warrants. There is no allegation in the answer that it was the understanding, or intention of the parties, or of the defendant himself, that the release should embrace this claim. The release is set up as a *legal* defence, and the defendant claims no benefit from it except what, upon the face of it, the strict rule of law will give him.

Second,—The defendant sets up in his answer, that he took the benefit of the bankrupt law, and on the 16th day of August, 1842, received his discharge from the District Court of the United States, for the district of New Jersey.

It is unnecessary to decide the question discussed on the argument: whether the character of this debt is such as to exclude it from the operation of the bankrupt law? The defendant cannot avail himself of the defence unless he *proves* it. This he has not done, and his answer, in this respect, cannot avail him.

The defendant must account for the one hundred dollars, and interest thereon, from the 4th of December, 1844.

The bill also prays an account of the rents and profits of certain lands and premises, in the bill described, from the 20th of March, 1847, up to the 7th of November, 1849.

The complainant and defendant, with their sister, were tenants in common of the lands in question, each entitled to one equal third part of the same.

There are three tracts of land lying adjacent to each other. On one of them is an apple orchard, and several cider mills and distilleries. The other tracts have been cultivated as farms.

All three of the tracts were occupied by tenants, under rent, for a number of years.

The distilleries, dwelling house, and other buildings, had been permitted to go to decay. The fences were dilapi-

dated, and the lands impoverished, by improper cultivation. In this situation of the premises, the defendant went into the possession of them. He rebuilt part of the dwelling house, which had fallen down, put the cider mills in repair, renewed the fences, and by proper cultivation renovated the farming land. In the following month of March, after the defendant took possession, the sister conveyed her interest to the complainant, who thus became seized of two equal undivided third parts of the lands and premises.

On the 13th of October, 1848, the complainant and defendant agreed to a division, and for this purpose entered into writings, under seal, by which they named and appointed three persons to divide the lands by metes and bounds, according to a line, or division thereof, agreed upon by the parties, and to value and appraise the respective shares, and to settle, to whom, and how, the difference in the valuation of the shares should be paid. A division was made in pursuance of the agreement; and it was determined, that the defendant should pay the complainant two thousand one hundred and fifty dollars, on the 10th day of January then following, when the parties should mutually release to each other their respective allotments. Releases were exchanged on the 16th of March, 1849, but the defendant did not deliver up the possession of the part allotted to the complainant until the 7th of November, 1849. The complainant claims one third of the rents from the 20th of March, 1847, the time when the defendant entered into possession, up to the 25th of July, 1848, when his sister made the conveyance to him of her interest; and from that period up to the 7th of November, 1849, he claims two-thirds of the rent.

The defendant denies that he had possession of the three tracts, but admits that he occupied the buildings and a part of the land; and he claims that the improvements made by him should be allowed him as a set off to the rent.

I think the evidence sufficiently proves, that the defendant had the possession of all the land. There is proof that he exercised a control over the whole of it, and that he de-



clared he had the possession, and would hold it, until the difficulties between himself and brother should be settled.

A proper allowance should be made to the defendant for the permanent improvements put by him on the premises. It is shown, that the repairs and improvements were absolutely necessary to make the buildings and premises tenantable, and to prevent their total dilapidation. The defendant had the benefit of the improvements in the division and valuation made by the individuals who made the partition between the parties; and it is equitable, under these circumstances, that in accounting for the rents and profits, the improvements should be taken into the account. For the repair of fences, and the manure put upon the land, the defendant can have no allowance in the shape of improvements. The impoverished state of the land, and the general condition, as to fences and other particulars essential to its enjoyment, will, of course, enter into the calculation in fixing an estimate of the value of the premises for the purposes for which they were adapted. The defendant is not entitled to a more liberal rule in taking the accounts, considering the circumstances of the whole case. By this mode of taking the accounts he will get a fair allowance for the manure and fences.

Let a reference be made to a master with directions to charge the defendant with the one equal third part of the yearly rent and value of the premises from the 20th March, 1847, to the 25th July, 1848, and with two equal third parts of their yearly rent and value from the 25th July, 1848, to the 7th November, 1849. Let an allowance be made to the defendant for the one-third of the value of the permanent improvements put by him on the premises between the first named period, and for the value of two-thirds of such improvements from the 25th of July, 1848, to the 1st of November, 1848, when the partition was made.

The decree of the Chancellor was affirmed unanimously.

JOHN BLACK, surviving executor of RACHAEL NEWBOLD, deceased, appellant; and SAMUEL WHITALL and LYDIA, his wife, respondents.

A palpable mistake appearing upon the face of an executor's account, after final settlement and allowance, may be relieved against in equity.

The twenty-seventh section of the act respecting the orphans' court, R. S., 214, was not designed to limit the powers or abridge the jurisdiction of the court of chancery. The design of the section is clearly to declare the conclusiveness of the settlements of accounts by the orphans' court, and to prescribe the particular cases in which alone that court may open the account and order a resettlement.

An advancement made in the lifetime of the testator is no part of the estate to be administered by his executor. And where the will directed that the advancement should be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the sum advanced should be deducted from the share of the child advanced. It was *Held*, that the whole design and operation of the clause was to designate the mode in which the distribution should be made, in order to insure perfect equality among the legatees. It did not change the nature of the advancement.

The notes of a debtor of an estate, who is non-resident and insolvent, may be omitted, both in the inventory and in the account, with perfect propriety. And no influence unfavorable to the executor should be drawn from it.

The laches of the husband to enforce the claim of a married woman for a legacy bequeathed to her is not available in equity to defeat the claims of the wife except upon the ground of presumption of payment.

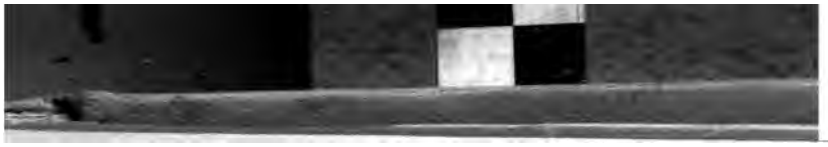
An advancement, as such, never draws interest.

"As a general rule, courts of equity conform to the principles of law, in its application of the doctrine of set-off, and will not allow debts accruing in different rights to be set-off against each other. But where an equity is created under particular circumstances, a court of equity will interpose where courts of law are not justified in doing it."

The facts of this case, so far as necessary to a clear understanding of the points decided, sufficiently appear in the opinion of the Chancellor, which was delivered October term, 1852.

Ten Eyck and *W. L. Dayton*, for complainant.

Spencer, *J. L. N. Stratton* and *P. D. Vroom*, for defendants.



THE CHANCELLOR. Rachael Newbold having, by her last will and testament, ordered certain legacies to be paid out of her personal estate, disposed of all the residue of her estate, both real and personal, as follows: "I do hereby direct, authorize and empower my executors, hereinafter named, to make sale of all the residue of my estate, whatsoever and wheresoever, real, personal, and mixed, at such time as in their discretion they may think expedient for the advantage of my legatees, and to make, execute, and deliver, to the purchaser and purchasers of my real estate, sufficient deeds of conveyance for the same in fee simple absolute, and the whole residue of my estate, consisting of the residue of my personal estate after the payment of my debts, funeral charges, and the legacies hereinbefore given and bequeathed, of the proceeds of the sales of my real estate, and of the sum of three thousand dollars, by me heretofore advanced to my daughter, Lydia Whitall, wife of Samuel Whitall, I order and direct to be divided into four equal parts—one equal fourth part whereof I give and bequeath to my daughter, Ann Stratton; one other fourth part thereof I give to my daughter, Lydia Whitall, but the sum of three thousand dollars already advanced to my said daughter, Lydia Whitall, to be a part of her share, and she to receive under this bequest only so much as the one equal fourth part of the residue of my whole estate as above mentioned may exceed the said sum of three thousand dollars; one other equal fourth part thereof I give and bequeath to my daughter, Sarah Black; and the remaining fourth part thereof I give and bequeath to my son, Caleb Newbold, his executors and administrators, in trust, &c., &c."

The surviving executors, Caleb Newbold and John Black, who are two of the defendants, in original bill, settled their accounts in the orphans' court of the county of Burlington, in the August term, 1836, of that court. By the account stated by the surrogate, and allowed by the court, the balance of the estate in the hands of the executors was thirteen thousand three hundred and eight dollars and seventy-four cents.

The object of this bill is, that the complainants may recover of the surviving executors of Rachael Newbold, that portion of the residue of the estate, which the testatrix bequeathed to her daughter, Lydia Whitall, one of the complainants.

The complainants, in their bill, charge, that the defendants committed a fraud in the settlement of their accounts in the orphans' court. The fraud alleged is, that the executors did not carry into their accounts the sum of three thousand dollars, advanced to the complainant, Lydia, by the testatrix, and which, by her will, the testatrix ordered, should make and constitute a part of her estate.

The complainants insist, that by the will of the testatrix, the sum of three thousand dollars is to be added to the sum of thirteen thousand three hundred and eight dollars and seventy-four cents, which would make in the hands of the executors, instead of the latter sum as appears by the stated accounts, the sum of sixteen thousand three hundred and eight dollars and seventy-four cents; and that the complainant, Lydia, being, by the will, entitled to the one-fourth, her proportion, after deducting from the one-fourth, as directed by the will, the sum of three thousand dollars, would be the sum of one thousand and seventy-seven dollars and thirteen cents, and not three hundred and twenty-seven dollars and eighteen cents, which would be all she would receive if the stated accounts are correct. There is no dispute between the parties as to the construction of the will. The defendants admit, that the estate should be settled upon the principle contended for by the complainants, but resist the payment to the complainants of anything under the will upon other grounds, which will be noticed hereafter.

The bill is answered by John Black and Caleb Newbold, who were then the surviving executors, and against whom the bill was originally filed. Caleb Newbold has since deceased. They deny the fraud with which they are charged in the bill, and give a very satisfactory statement how it happened, that the accounts were stated in the manner they were. They had in their possession, as



executors, the obligations or evidences of debt, of a large amount due from the complainant, Samuel Whitall, the husband of the legatee, to the testatrix. They were advised by the surrogate, that they had a right to deduct the indebtedness of the husband from the legacy to the wife, and to charge interest likewise, on the advancement of three thousand dollars. If this advice was correct, there was no necessity of carrying into the accounts the said sum of three thousand dollars, nor the amount which Samuel Whitall owed the estate. He was insolvent. The amount of his indebtedness to the estate, together with the interest on the advancement, would exceed his wife's interest in the residue, In this view, no one was prejudiced by the mode in which the accounts were stated. I do not think there is any ground for charging the executors with fraud, nor do I believe they intended to commit any, in stating their accounts as they did. I do not see any necessity, in this case, of imputing fraud to the executors. If the complainants are entitled to anything from these executors, under the will of the testatrix, their rights are in no way affected by the mode in which the executors have stated their accounts in the orphans' court, nor by the allowance of those accounts by the court.

The defendants, in their answer, resist the claim of the complainants upon several grounds.

First, They insist, that the action of the orphans' court was final, and there being no fraud, or mistake, this court cannot open the accounts.

It is not necessary to open the accounts, or to interfere with any action of the orphans' court, in order to ascertain the complainants' rights, or to give them the relief they seek, if they are entitled to it. The accounts, as stated and allowed, do not in any way involve the adjudication of the complainants' rights by the orphans' court. The result of those accounts, and the adjudication of that court, ascertain the residue of the estate in the hands of the executors. That residue was to be disposed of according to the directions of the will. The complainants now claim, the portion

of that residue, which, by the will, was given to the complainant, Lydia Whitall; and what that portion should be, was a question which was not in any shape before that court. The directions of the testatrix are plain. To that residue is to be added the sum of three thousand dollars, in the hands of Lydia, and then the amount is to be divided into four portions. The result is the same as if the three thousand dollars had been carried into the accounts stated before the court. It might have been more correct so to have stated the accounts, but because they were not so stated, does not involve the necessity of opening them, or of interfering with them as they were passed by the orphans' court. The defendants do not pretend, that the orphans' court made any adjudication upon the matters involved in the controversy between the parties, or that the court passed the accounts in the shape they appear, for the purpose of including the complainants in the claim which they make in this suit.

It is not necessary, therefore, to decide the question discussed by counsel,—whether this court will, in the exercise of its jurisdiction over the accounts of executors and administrators, interfere with a final settlement made by them in the orphans' court, upon any other ground than that of fraud? The propriety of the court's interfering in cases of fraud, was conceded.

The defendants, as a further defence, insist, that at the death of the testatrix, Samuel Whitall, one of the complainants, was largely indebted to her estate—that the amount of that indebtedness very much exceeded the proportion of the residue to which his wife was entitled under the will; that they, the executors, set off the one against the other, and upon that principle settled with the other residuary legatees; that the complainants have agreed to such settlement of the estate, and have acquiesced in it as a family arrangement. The only evidence of agreement, or acquiescence, on the part of the complainants, is the fact, that they took no legal steps to enforce the claim which they now make, until the filing of the bill in this cause, which



was a period of ten years from the settlement in the orphans' court. During this whole term, the complainants were residing in the District of Columbia; and I do not think this delay is sufficient evidence of itself, of any such acquiescence, or family arrangement, as is insisted.

But, the important question in this controversy is,—whether the court will decree, that the surviving executor of Rachael Newbold shall pay to the complainants the legacy left to Lydia Whitall, without allowing the executor to set off the indebtedness, which he alleges to be due from the husband of the legatee to the estate of the testatrix.

The defendant insists, that the fund out of which the legacy is to be paid, is constituted, in part, of the debt which the husband of the legatee owes the estate; and as the object of this suit, and its legal effect, is to reduce the legacy into the absolute form and control of the husband, it is equitable, that he should take in payment that part of the fund made up of his own debt.

The statement of the proposition shows that its proper solution depends upon the intention of the testatrix. If by her will the husband's debt constitutes, in part, the fund to pay the legacy to the wife, and there are no circumstances inconsistent with the fact of such being the testatrix's intention, this court ought not to aid the husband to reduce the legacy into his possession, without at the same time compelling him to take his own debt in part payment.

There is no technical difficulty in the way of the court's making such a decree, if it is equitable to set off the debt against the legacy.

As a general rule, courts of equity conform to the principles of law in its application of the doctrine of set-off, and will not allow debts, accruing in different rights, to be set off against each other. But where an equity is created under particular circumstances, a court of equity will interpose, where courts of law are not justified in doing it. (*Story's Eq. Ju.*, § 1437, *and note* 2.)

What is the equity of the case before us? This must depend upon the nature of the debts due from the husband to

the estate, the attending circumstances of their contraction, and the character of the bequest. If from these considerations we can come to a satisfactory conclusion as to the intention of the testatrix upon the matter in controversy, that intention ought to prevail.

In the case of *Gallego v. Gallego's Executors*, 2d *Brock. R.* 286, in which Chief Justice Marshall gave the opinion of the court. The suit was on behalf of the wife of Henry Newman, by her next friend, to recover from the defendant a legacy which had been left to her by the will of a near relation, of whom she was an heir. The husband executed an instrument of writing, by which he transferred all his marital rights in the legacy to the wife, and gave her full authority to receive it. The defendants set up that the legatee's husband was indebted to the testator, and that this debt ought to be deducted from the legacy. The court decided that where the testator advanced money in his lifetime to a *husband*, whose wife was a relation, and would be, at his death, an heir and distributee of the testator, and directed that the husband should be debited with the amount, that it might be deducted, after the testator's death, "from the share coming to the family," and the testator *afterwards* made his will, bequeathing a legacy to the *wife; non constat*, that the testator designed that the advance made to the *husband* should be deducted from the legacy bequeathed to the *wife*, and the court decreed the whole legacy to be paid to the wife, without discounting the husband's debt. The case itself, together with the form of its prosecution, differ somewhat from the one we are now considering, but it is important as showing that the case was decided upon the intention of the testator, derived from the will—the nature of the debt due from the husband—and the circumstances attending the contracting the debt.

What was the intention of the testatrix in the case before us?

It was, most manifestly, her intention that her daughter Lydia should receive *something* from her estate. And yet she was aware that if the indebtedness of her daughter's hus-



band, as insisted upon now by the executor, should be appropriated to the payment of the legacy, his wife never could get one farthing, for that indebtedness amounts to a much larger sum than the one-fourth of the residue. If she intended that the residue of her estate should be divided as the executor insists, and as he, with his then co-executor, did divide it, why did she not say so? There was no necessity, if such was the testatrix's intention, of the particularity observed in the will as to what should constitute the residue of her estate, and as to the manner in which the three thousand dollars was to be carried into the accounts. Had her views corresponded with that of the executors, she would have concluded, as they did, that it was a useless expenditure of money and waste of time, to have her estate settled in the particular manner she directed. As her daughter Lydia, under these circumstances, could have no interest in it, she would at once have divided it between her three other daughters.

Let us examine the nature of the several debts sought to be deducted.

First, the executor insists upon deducting the sum of five hundred and thirty-nine dollars and thirty cents, with interest from the 25th of March, 1816—a debt of more than eight years' standing when the will was made. In the case of *Gallego's Executors*, before referred to, Chief Justice Marshall remarks: "If it was perfectly clear that the testator, at the time of making his will, or at the time of his death, intended this advance to the husband to be set off against the legacy of the wife, the court would feel great difficulty in disappointing such intention. But this is not perfectly clear; the debt is due from Newman, the legacy is given to his wife. The debt, therefore, may still exist, and yet not be a set-off against the legacy. Had the money been advanced subsequent to the date of the will, there would have been more reason for considering it as satisfaction in part of the legacy, but even then it would not necessarily be so considered. But this advance being made anterior to the will, gives countenance to the opinion that the testator did

not intend it as a deduction from the legacy. The will being subsequent, and to a different person, furnishes probability to the opinion, that if a provision for the debt had been in the mind of the testator, his will would have given some indication of his intention respecting it." The will in that case was only three years subsequent to the time when the debt was contracted.

Here was a stale debt; upon the face of it, it was barred by the statute of limitations. The debtor was insolvent. The testatrix knew, that looking to the debtor's personal responsibility, her estate never would realize any part of the debt. She had the opportunity of securing it to her estate by her will, but did not see proper to do so. I do not think that the testatrix regarded that debt as any part of the fund out of which any of her legacies were to be paid.

With regard to the debt of two hundred and ten dollars, the circumstances connected with it are very different. When the testatrix made the advancement of three thousand dollars to her daughter, she took from her husband the following writing:

"I promise to pay Mrs. Rachael Newbold, on or before the fifteenth day of August, two hundred and ten dollars, being one year's interest on three thousand dollars, which Lydia N. Whitall has received from her mother, and which money is to be realized for and on account of Lydia N. Whitall.

"SAM'L WHITALL.

"GEORGETOWN, August 31st, 1823."

This writing is evidence that the testatrix intended that one year's interest, at least, should be paid on the advancement made to her daughter. It is true that the testatrix knew at the time she took the writing, that Whitall was insolvent; but still her taking it showed her intention that she meant he should account for the amount the writing called for. She confided in his future ability to pay it. She made no special reference to it in her will. When she made her will the debt was not due. Unlike the other, upon the face of it, it was a valid subsisting debt due to her, and which she relied upon realizing for the benefit of her



estate. It constituted a part of her estate which was to make up the residue, a fourth part of which she bequeathed to her daughter. There is another circumstance connected with her estate which she did not foresee, and which makes it equitable, that this debt should be considered as part of the residue of the estate which should be appropriated, in part, to the payment of this legacy. It is manifest that the testatrix intended her four daughters, of whom Lydia, the complainant was one, should each have a like portion of her property. Had the estate been settled within a short time after her decease, by carrying this debt into her estate, and deducting it from Lydia's portion, this intention would have been carried out. But such was the nature of the property left in the hands of the executors, that the residue, which was to be divided between her four daughters, was not ascertained until twelve years afterwards. Of this delay, no complaint is made in the bill, nor by any one interested in the estate, and it seems to have been necessary. The consequence is, that Lydia has the benefit of the interest on the three thousand dollars advanced to her, for twelve years, and has the advantage over her three sisters to the amount of three-fourths of that interest—upwards of fifteen hundred dollars—in the distribution of the estate. I cannot believe the testatrix ever contemplated such a result; and yet there is no principle of law which will authorize the court to charge Lydia with interest on the three thousand dollars. There seems, under these circumstances, a manifest equity, where the husband is seeking to reduce the legacy into his absolute possession with the consent of the wife, and without her asking the interference of the court to protect the legacy for her benefit, to compel the husband to take, in part payment, his own debt, constituting, by the intention of the testatrix, in part, the fund out of which the legacy is to be paid. If the complainant, Samuel Whitall, is not compelled in this suit to discharge the debt, it is entirely lost to the estate; and the husband, in right of his wife, will receive that much more in the distribution of the estate than the three daughters of the testatrix, who were each to receive an equal share with his wife.

As to charging the complainants with interest on the three thousand dollars. Upon what principle can it be done? It cannot be done, unless the testatrix has so directed by her will. It may appear to us proper and just that the complainants should be charged with the interest; and yet, if we knew the reasons and motives which operated upon the testatrix's mind in the testamentary disposition of her property, we might readily appreciate the wisdom of the testatrix in not charging her daughter with interest on this advancement. What influence did the misfortunes and pecuniary embarrassments of the husband, and the necessities or wants of this daughter over her other children, exert over the mind of the testatrix in the distribution of her estate? But we cannot speculate or decide this case, upon our judgment of the justice or propriety of this particular devise. The only question with the court is, what *is* the devise? and not what ought it to have been. We cannot make a will for the testatrix. What is written we must give effect to according to law.

I do not see room for doubt about this matter. If the testatrix had said nothing of the three thousand dollars in her will, it could not have been brought into the estate at all, unless it could be made to assume the shape of a debt due to the estate. That could not be. An *advancement* to a daughter could, under no circumstances, be converted into a debt due from the husband. It could not be a debt due from the daughter. She being a married woman could not contract a debt. Had Rachael Newbold died intestate, her daughter Lydia's portion of her mother's estate would have been chargeable with the three thousand dollars as an *advancement*. In such case, it is admitted no interest could have been charged upon it. But the testatrix, by her will, has directed the three thousand dollars which she had advanced to her daughter—but not the interest—to be charged against her daughter. The court is now asked to do more than the testatrix directed, and to charge not only the three thousand dollars, but interest on it also. How shall it be charged? upon what principle? It was an *advancement*



to the wife. The testatrix so declares it. The husband is not liable for interest on it. The principal is not a debt due from the husband, and of course he cannot be called upon for the interest. If the husband is not in law liable for the interest, and the testatrix has not by her will directed it to be charged against her daughter, it is difficult to perceive by what authority, or with what propriety, this court can allow it as a charge against the complainants.

I am of opinion that the debt of two hundred and ten dollars should be carried into the accounts, and that in distributing the residue as directed by the will of the testatrix, it should be deducted from the portion to which Lydia Whitall is entitled. In ascertaining the amount due to the complainants, the calculation is a simple one, and there is no necessity of the expense or delay of a reference.

The amount ascertained by the accounts is thirteen thousand three hundred and eight dollars and seventy-four cents. To this sum is to be added the three thousand dollars as directed by the will, and the further sum of two hundred and ten dollars, with interest from August 15, 1824, up to August 15, 1836, when the accounts were settled and the residue ascertained for distribution; which would be three hundred and sixty-one dollars and twenty cents. The amount of these several sums makes sixteen thousand six hundred and sixty-nine dollars and ninety-one cents, one-fourth of which the complainants are entitled to receive with interest from August 15th, 1836, after deducting therefrom the three thousand dollars advancement, and the debt of three hundred and sixty-one dollars and twenty cents.

The principal sum will be found to be eight hundred and six dollars and twenty-seven cents, and the interest up to October 20, 1852, seven hundred and eighty-two dollars and sixty-five cents, making due to the complainants, October 20, 1852, the sum of one thousand five hundred and eighty-eight dollars and ninety-two cents.

The counsel can make the calculation, and point out any inaccuracy that may exist, which will be corrected.

The opinion of the Court of Appeals was delivered by

GREEN, C. J. The first point relied upon for reversing the decree of the Chancellor in this case is,—That the decree of the orphans' court, confirming the accounts of the executors of Rachael Newbold, is final and conclusive, and cannot be set aside or opened in equity, except for *fraud*. The legal principle insisted on is, that in the absence of fraud, a palpable mistake appearing upon the face of an executor's account, after final settlement and allowance, cannot be relieved against in equity, but can only be corrected by application to the orphans' court for re-settlement. The objection is based upon the provisions of the twenty-seventh section of the act respecting the orphans' court, (*Rev. Stat.*, 214), by which it is enacted, that the sentence or decree of the orphans' court on the final settlement and allowance of the accounts of executors, shall be conclusive upon all parties, and shall exonerate and forever discharge every such executor from all demands of creditors, legatees, or others, beyond the amount of such settlement, except for assets or moneys which may come to hand after settlement as aforesaid—excepting, also, in cases where a party applying for a re-settlement, shall prove some fraud or mistake therein, to the satisfaction of the said orphans' court. The design of the action is clearly to declare the conclusiveness of the settlement of accounts, by the orphans' court, and to prescribe the particular cases in which alone that court may open the account and order a re-settlement. It was not designed to limit the powers or abridge the jurisdiction of the court of chancery. If this be otherwise, it clearly takes from the court of equity the power to interfere in cases of *fraud*, as well as in cases of *mistake*. Prior to this enactment, the court of equity had a clear right to correct mistakes in the accounts of executors after final settlement. A settlement and *quietus* in the orphans' court were not conclusive as to the correctness of the accounts, but they were liable to be inquired into even at law.

Livingston v. Combs, *Coxe*, 42, and in Turner's case, 2



Roll's Ab., 678, it is said, that at law, upon *plene administrabit* pleaded, the account given to the ordinary shall not be given in evidence, nor any regard had to it.

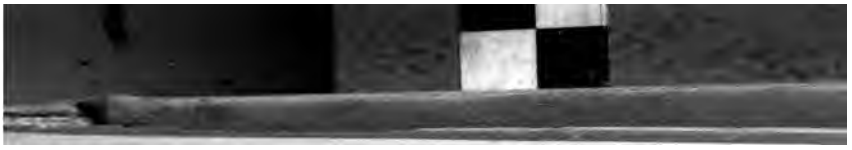
In *Bejsell v. Axtell*, 2 *Vern.*, 47, an account of an intestate's estate was decreed to be taken in equity, notwithstanding an account was previously taken, and a distribution decreed in the spiritual court.

The later authorities, however, regard the settlement of an account in the ecclesiastical court, upon notice to all parties in interest, as final. *Penire v. Luscomar.* 2 *Jac. & W.*, 201; *Toller on Ex'rs*, 492; 2 *Williams on Ex'rs*, 1776. But the force of the objection consists in the fact, that the statute creating orphans' courts creates them courts of record, and declares that their decrees shall be final; thus placing their judgments, it is insisted, on the same ground with the judgment of any other court of record, and precluding a court of equity from correcting such judgments for any mistake. It is true, a court of equity does not formally correct mistakes in judgments at law, but it has the undoubted power, and it anciently formed a very extensive branch of equity jurisdiction, to relieve not only against fraud, but against surprise, injustice, or mistakes, suffered or committed in a court of law, by compelling the party to submit to a new trial, or by granting a perpetual injunction against his execution. *Graham on New Trials*, 557; 6 *John. Chan. R.*, 70.

A court of equity, moreover, had, at the time of the passage of the act in question, and still has, concurrent jurisdiction with the orphans' court in the settlement of executors' accounts. *Salter v. Williamson*, 2 *Green's C. R.*, 480. In correcting an obvious mistake upon the face of the account as settled, a court of equity does not attempt to review the judgment of the orphans' court. The matter in question is not *res adjudicata*. It never was passed upon by the orphans' court. It is believed, moreover, to be not only in accordance with the sentiment of the profession, but with the practice of the court of equity to correct, even incidentally, the mistakes of a settlement in the orphans' court. Such

was obviously the opinion of Chancellor Vroom, in *Gray v. Fox*, *Saxton's R.*, 259; in *Peacock v. The Ex'rs of Newbold*, 3 *Green's Chan.*, 61, which was a bill for the recovery of a residuary legacy; the bill contained no allegation of any mistake in the settlement before the orphans' court. But upon the production of the account the mistake was apparent, and it was conceded as an unquestioned point, that the error could be corrected in law, and if the complainant was entitled to recover at all, she should recover the full amount of her share, without the necessity of resorting to the orphans' court to have the mistake corrected in that tribunal. The practical importance of this question, and the earnestness with which it was pressed upon the attention of the court, rather than its influence upon the result of the present case, render the expression of the views of the court in regard to it, proper.

But does the decree of the Chancellor, in point of fact, set aside, or open, the decree of the orphans' court? The complainants' bill does, indeed, charge, that the sum of three thousand dollars, advanced to Lydia Whitall, was unlawfully and fraudulently omitted, both in the inventory and in the account. But it is apprehended that it was omitted from both with perfect propriety; and to have inserted it in either, would have led to serious embarrassment. The inventory required to be exhibited by the executor, is an inventory of the *goods*, *chattels*, and *credits*, of the deceased. An advancement is neither; it forms no part of the estate; it cannot be resorted to for the payment of debts. The child advanced cannot be compelled to refund for any purpose connected with the settlement of the estate. To require the executors to include the advancement in the inventory, would not only be in contravention of the statute, but would render them liable for moneys to which they had no title, and for which they were in no sense liable. So, the executor is required to account, and does account, for so much of the goods, chattels, and credits, of the deceased as came to his hands to be administered, and for his payments and disbursements out of the same. But an advancement



made in the life-time of the testator, is no part of the estate to be administered by his executor. As has been already said, it can upon no contingency be recovered back from the person advanced, even for the purpose of equalizing legacies. The accounting executor and the surrogate, therefore, rightly held, that the sum of three thousand dollars advanced by Rachael Newbold, the testatrix, in her life-time, to her daughter, constituted no proper part either of the inventory of the estate or of the final account of the executor. It constituted no part of the estate. It never came to the hands of the executors to be administered. They never could have been held liable for it, as they are for the balance of the estate, to legatees or next of kin. The will does, indeed, declare, that the advancement shall be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the three thousand dollars advanced shall be deducted from the share of the child advanced; but the whole design and operation of the clause is to designate the mode in which the distribution shall be made, in order to insure perfect equality among the legatees. It does not change the nature of the advancement.

So in regard to the two notes claimed by the estate against the husband of Lydia Whitall: they were omitted, both in the inventory and in the account, with perfect propriety. The debtor was non-resident and insolvent. The notes never could have been recovered from him. They were desperate debts. If included in the inventory, the executor must, in his final account, either have prayed an allowance for them as desperate debts, which would have left the balance of the accounts precisely as it now is, besides adding additional embarrassment to the matter in controversy; or he must have charged himself with the amount as a part of the balance in his hands, and thereby, in several possible contingencies, have rendered himself personally liable for money which he never received, and for which he was bound neither in law nor in equity to account. Under the peculiar circumstances of the case, the executor, in omit-

ting the claims against Samuel Whitall from the inventory and from the account, took a perfectly justifiable course, and the only one which, in prudence, he could have taken. There was neither fraud nor mistake in the omission, and no inference unfavorable to the executor should be drawn from it.

There is, then, neither fraud nor mistake in the account of the executor as settled and allowed by the orphans' court. It presents truly the balance of the estate of the testatrix which came to the hands of the executors to be administered. The sum in their hands to be distributed is thirteen thousand three hundred and eight dollars and seventy-four cents, —the balance apparent upon the face of the account. The only question is, how that sum is to be distributed among the legatees in pursuance of the directions of the will. It was justly observed by the Chancellor that, "it is not necessary to open the accounts or to interfere with any action of the orphans' court in order to ascertain the complainants' rights, or to give them the relief they seek." In point of fact, the decree of the court of chancery has in no wise altered or interfered with the account as settled and allowed by the orphans' court.

The second point relied upon for reversal is that the account has been acquiesced in for so long a period before bill filed, that equity will not interfere.

As has been already said, the decree of the Chancellor in no wise disturbs the account as settled by the executor. That account, in connection with the directions of the will in regard to the advancement and the mode of distribution, exhibits a larger sum due to the complainant than is allowed by the Chancellor's decree. The final account was settled in August, 1836, exhibiting on its face a balance due to the complainants. The bill in this cause was filed in December, 1846, something more than ten years afterwards. The legatee, during all that period, has been a married woman. Upon the death of her husband, the claim would survive to her. The statute of limitations could not be pleaded against her either at law or in equity. The only view in which the de-



lay can avail the defence is either, first, upo the ground that the delay has been such as to raise a presumption of payment, (which is not pretended.) or second, that greater injustice will arise to the defendant from the complainant's laches and delay in enforcing her claim, than would result to the complainant from a denial of her rights.

The case affords no ground whatever for arriving at such conclusion. I know of no case where the lahces of the husband to enforce the claim of a married woman for a legacy bequeathed to her, has been held available in equity to defeat the claim of the wife, except upon the ground of presumption of payment. In *Peacock v. Newbold's Executors*, 3 *Green's Chan. R.* 71. the bill was filed to recover a legacy to a married woman, thirty-one years after the death of the testator, twenty-four years after the settlement of the estate, and seventeen years after the death of the executor, and no cause shown for the delay. The bill was dismissed by the Chancellor, on the ground of the presumption of payment, arising from the time which elapsed before suit brought. That decree was unanimously affirmed by this court, upon appeal. Neither the lapse of time, nor the attendant circumstances, create any analogy between the two cases.

The third and last point relied on for reversal, is that nothing is due to the complainants.

In stating the accounts between the parties, it is clear—

First. That no interest on the advancement of three thousand dollars should be charged against the legatee. An advancement as such never draws interest. There is nothing in the will that indicates an intention on the part of th testatrix that it should draw interest, but the reverse. The apparent inequality created by the length of time which the advancement is held and enjoyed before the other legatees receive their share, constitutes no ground for charging the advanced legatee with interest. It is an inequality which always exists where advancements are made at different times by a parent among a family of children.

Second. The bill due from Samuel Whitall to the testatrix, March 25th, 1816, for five hundred and thirty-nine dol-

lars and thirty cents, should not be allowed by way of set-off. It had been due more than six years at the time of the advancement to the daughter. The husband was then insolvent. If the testatrix had intended that it should be paid, it would either have been settled at the time of the advancement, or have been specially directed by the will to be deducted from the wife's share.

There is no error in the decree prejudicial to the rights of the appellant.

It is insisted that there is error in the decree prejudicial to the respondents, in this, that it allows the executor to set off a debt due to the estate of the testatrix from the husband, against the wife's claim for her legacy. It would, perhaps, be a sufficient answer to this exception that no appeal has been taken from this portion of the decree. But waiving this formal answer, and admitting the question to be fairly open for consideration, there is no error in this particular in the decree.

It cannot be maintained as a general proposition that in a bill by a husband and wife for the wife's legacy, the executors will be permitted to set off debts due from an insolvent husband to the estate. The principles upon which equity acts in aiding the husband to recover the wife's legacy, are inconsistent with the allowance of the set off, to the prejudice of the equity of the wife. Following the principles of the civil law, equity in suits to recover the wife's property, regards the interests of the husband and wife as totally distinct. It does not treat the property of the wife, where the husband is seeking to reduce it into possession, as the property of the husband. It will not, as a general rule, aid the husband, except upon his making suitable provision for his wife. The principle is laid down in the broadest terms, that equity will not interfere to put the husband in possession of the wife's property, without his making suitable provision for her, unless she voluntarily, on examination, waive any provision. And the practice has been adopted, in cases like the present, where the bill is filed in the name of the husband and wife, and no objection made on the part of the



wife to the husband's recovering the legacy. *Brown and wife v. Elton*, 3 *P. W.*, 202; *Glen and wife v. Fisher*, 6 *John. C. R.*, 33, 36; 2 *Kent's Com.* 140.

So long as the court has the direction or control of the fund out of which the equity of the wife is to be secured, her claim cannot be defeated by any management of the husband. *Clancey on hus. and wife*, 509.

But in the present case the allowance was made to the executors as a matter of equity resulting from the provisions of the will. The Chancellor regarded the debts of the husband as a part of the fund out of which the legacy to the wife was to be paid, and on that ground it was deemed, under the circumstances of the case, inequitable that the husband should reduce the legacy into possession without allowing by way of set off, this debt due from him to the estate. As no claim was set up on behalf of the wife, in the court below, of any equity in the legacy, this court could not on that ground reverse the decree.

I am of opinion that the decree of the Chancellor should be in all things affirmed, with costs.

Decree accordingly.

The decree of the Chancellor wys affirmed by the following vote:

For Affirmance:

GREEN, C. J.

Justice OGDEN,	Judge HUYLER,
" ELMER,	" VALENTINE,
" POTTS,	" CORNELISON,
" HAINES,	" RISLEY.

For Reversal:—Judge WILLS.

COURT OF ERRORS AND APPEALS.

MARCH TERM, 1854.

Between WILLIAM POTTS, trustee, &c., SAMUEL R. HAMILTON *et al.*, appellants, and THE TRENTON WATER POWER COMPANY *et al.*, respondents.

The act of 15th of February, 1844, entitled "An act to relieve the creditors of the Trenton Delaware Falls Company," by which the receivers who had been appointed by the court were authorized to sell the real estate, franchises, and works of the said company free and clear of all encumbrance, and providing that nothing in the act contained should be construed to affect the rights of the creditors, or to invalidate any existing lease made by said company, *or assignment thereof*, is a constitutional and valid act. It was designed to be in aid of the creditors of the company, not to invalidate any contracts, but to enforce them—not to impair any securities, but to aid in obtaining the benefit of them.

The assignment of a lease is properly the transfer of the interest of the tenant. The reason and spirit of the law, no less than its language, requires *that the assignment of leases* should be construed to refer to the transfer of the rights of the tenants, and not to a mere assignment of the rent. Upon this interpretation the act is constitutional.

A company authorized to draw water from a river, and owning the race-way and the land upon which it was constructed, have the right to the use of the water flowing over their land through their race-way, as incident to the ownership of the lands, as in fact a part of the land itself; and in such case, neither is the rent of the water, nor the right to receive and demand it, a franchise.

This was a bill of interpleader filed in the Court of Chancery, on the 24th August, A. D., 1846. It alleges, That complainants, Benjamin Fish et al., were, by an act of the legislature of the state of New Jersey, passed on the sixteenth day of February, in the year of our Lord one thousand eight hundred and thirty-one, incorpor-



ated and created a body politic, with authority to cut and construct raceways and create a wate · power, in the manner specified in said act, to be used for mills and manufacturing purposes, and that, under and by virtue of said act of incorporation, the said company was organized and went into operation.

That in and by a certain indenture of lease, bearing date on the sixteenth day of December, in the year of our Lord one thousand eight hundred and thirty-five, and made by and between the said the Trenton Delaware Falls Company, of the one part, and Benjamin Fish et al, of the other part, the said the Trenton Delaware Falls Company did demise and lease unto Benjamin Fish et al., and to their heirs and assigns, the right and privilege of cutting a sufficient opening or passage through the bank or side of the canal or main raceway belonging to said company, whereby water might be drawn from the said canal or raceway, together with the right and privilege of drawing from the said canal a certain quantity of water, in the manner and for the purposes in said lease specified; yielding and paying therefor, unto the said the Trenton Delaware Falls Company, the yearly rent or sum of five hundred dollars, in four equal quarterly payments of one hundred and twenty-five dollars each, to be paid on the first days of January, April, July, and October, the first of which was to be made on the first day of January then next.

That the said the Trenton Delaware Falls Company, in and by a certain deed of assignment endorsed in writing upon the said indenture of lease, and bearing date on or about the nineteenth day of December, in the year of our Lord one thousand eight hundred and thirty-five, after reciting, that "whereas the Trenton Delaware Falls Company are indebted to Samuel R. Hamilton, Thomas J. Stryker, and William Potts, of the city of Trenton, county of Hunterdon, and state of New Jersey, in the sum of five hundred dollars, each, to Jasper S. Hill, of the township of Ewing, in said county and state, in the sum of five hundred dollars, to John Whittaker, of the township of Nottingham,

county of Burlington, and state aforesaid, in the sum of five hundred dollars, to John McKelway, of the city of Trenton aforesaid, in the sum of two thousand dollars, to Timothy Abbott, of the city of Philadelphia, in the state of Pennsylvania, in the sum of five hundred dollars, to Nathaniel Potts, of the same place, in the sum of one thousand dollars, and to Joseph Trotter, of the same place, in the sum of three hundred dollars, amounting in the whole to the sum of six thousand three hundred dollars, for money borrowed of them by the said company to aid in completing their water power at and near the city of Trenton; and are desirous to secure to the said several persons the interest due and to grow due to them, respectively, upon the said several sums of money aforesaid, until the principal thereof shall be fully paid and satisfied," did, in consideration of the matters above set forth and of the sum of one dollar to them paid by William Potts, of the city of Trenton aforesaid, grant, assign, and set over unto the said William Potts the said indenture of lease and all the rent and sum or sums of money due and to grow due thereon, as the same should become due and payable; to have and to hold the same, and to collect and receive the said rents, and every part and parcel thereof then due and owing or which might thereafter become due and payable upon and by virtue of the said lease; in trust nevertheless, in the first place, for the payment of the interest due and to become due to the said Samuel R. Hamilton, Thomas J. Stryker, William Potts, Jasper S. Hill, John Whittaker, John McKelway, Timothy Abbott, Nathaniel Potts, and Joseph Trotter, aforesaid, upon the said several sums of money so due to them as aforesaid, as the same should become due and payable; in the second place, to pay over to the said the Trenton Delaware Falls Company, and to the treasurer thereof, the balance of moneys which should remain in his hands from time to time, as the same should be received from the lessees named in the said lease, their heirs, executors, administrators, or assigns, after satisfying the interest as aforesaid; and in the third place, upon full payment and satisfaction of

the said several debts so due as aforesaid to the parties aforesaid, respectively, or to their legal representatives, by the said the Trenton Delaware Falls Company or their successors, then forthwith to execute a re-assignment of the said deed or indenture of lease, and all the rights, powers, and interests granted by the said assignment to the said company or their successors.

That Fish and Green bought the interest of Grant and Cook; that they ever since have been and now are in the quiet and lawful possession, exercise, and enjoyment of the rights and privileges demised in and by the said lease; and that they have, from time to time, since the said first day of April, eighteen hundred and thirty-eight, paid to the said William Potts, trustee as aforesaid, the said annual rents, as the same became due and payable, up to the first day of January, in the year of our Lord one thousand eight hundred and forty-five.

That John McKelway, one of the persons named in the said deed of assignment, has received full payment and satisfaction of his said debt, therein mentioned, whereby all his interest under the said assignment was extinguished; as by an endorsement in writing upon the said indenture of lease, signed by the said John McKelway, will appear.

That the debt due from the said the Trenton Delaware Falls Company to the said Nathaniel Potts, and mentioned in the said deed of assignment, has been assigned and transferred to the said William Potts, named in the said deed of assignment, by virtue whereof all the interest of the said Nathaniel Potts in and under the said indenture of lease, and the assignment thereof as aforesaid, passed to the said William Potts.

That the debt due from the said the Trenton Delaware Falls Company to the said Joseph Trotter, and mentioned in the said deed of assignment, was, by the said Joseph Trotter, assigned and transferred to the said Timothy Abbott, in the said deed of assignment named, by virtue whereof all the interest of the said Joseph Trotter in and

under the said indenture of lease, and the assigment thereof, as aforesaid, passed to the said Timothy Abbott.

That the said Timothy Abbott departed this life, having first duly made and executed his last will and testament in writing, and therein and thereby appointed Charles H. Abbott and George Abbott the executors thereof; and that the said Charles H. Abbott and George Abbott have taken upon themselves the burthen of the execution of the said will.

That the said the Trenton Delaware Falls Company, having become indebted unto one Isaac Ivins for money borrowed by said company of the said Isaac Ivins, upon the condition that a further interest in the indenture of lease hereinbefore mentioned should be assigned to the said William Potts, to secure the payment of the interest upon said debt to the said Isaac Ivins, the president of the said the Trenton Delaware Falls Company was, on or about the fourteenth day of September, eighteen hundred and thirty-eight, at a meeting of the board of managers of said company, authorized to assign to the said William Potts a further interest in the said indenture of lease, hereinbefore mentioned, for the benefit of the said Isaac Ivins, to secure to him the interest on six hundred dollars, he having advanced that sum for the use of said company.

That the said Isaac Ivins received from time to time of the said William Potts, trustee as aforesaid, out of the annual rents paid to him, the interest upon the said sum of six hundred dollars above mentioned, and that the said Isaac Ivins claims to have an interest in and under the said indenture of lease, and the rents due and to become due thereon, to secure the payment of the interest upon his said debt.

That on or about the ninth day of June, in the year of our Lord one thousand eight hundred and forty-three, the said the Trenton Delaware Falls Company, the lessors in the said indenture of lease named, having become insolvent, James Ewing, Philemon Dickinson, and Samuel S. Stryker, esquires, were appointed by this honorable court receivers

of the said the Trenton Delaware Falls Company, with full power and authority to sell, convey, and dispose of the real and personal estate, franchises, and works of the said company.

That on or about the twentieth day of February, in the year of our Lord one thousand eight hundred and forty-four, the real estate, works, and franchises of the said the Trenton Delaware Falls Company were, by the said receivers, sold at public sale to the highest bidder; and that afterwards, to wit, on or about the eighth day of March, in the year last aforesaid, the said receivers executed and delivered to the purchaser or purchasers thereof a deed of conveyance for the real estate, works, and franchises aforesaid.

That under and by virtue of an act of the legislature of the state of New Jersey entitled, "An act to relieve the creditors of the Trenton Delaware Falls Company," passed the fifteenth day of February, eighteen hundred and forty-four, the purchasers of the real estate, franchises, and works of the said the Trenton Delaware Falls Company were authorized to hold the said real estate, works, and franchises in the same manner that the original stockholders held the same. And in and by the said act it was also, among other things, enacted and provided, that after said purchase, the said company should be known as "The Trenton Water Power Company," and by that name should sue and be sued, and exercise all its corporate powers.

That, under the authority of the act of the legislature above mentioned, the Trenton Water Power Company was organized and went into operation; and that the said the Trenton Water Power Company now hold, possess, occupy, and enjoy the real estate, works, and franchises of the said the Trenton Delaware Falls Company; and, by reason thereof, claim to be the landlords of complainants in the place of the said the Trenton Delaware Falls Company, the lessors named in the said indenture of lease, and to be entitled to collect and receive the rents due and to become due from them.

That they have been informed and believe that Thomas J. Stryker, one of the persons mentioned in the said deed of assignment, and for whose benefit the same was made, has assigned and transferred all his interest in and under the said indenture of lease, and the assignment thereof as aforesaid, unto the said the Trenton Water Power Company, or to James M. Redmond, esquire, the president of the said company, for their use.

That the said William Potts, to whom the said indenture of lease was assigned in trust as aforesaid, claims to be entitled, in behalf of himself and of the said Samuel R. Hamilton, Jasper S. Hill, John Whittaker, Isaac Ivins, and Charles H. Abbott and George Abbott, executors of the last will and testament of the said Timothy Abbott, deceased, to collect and receive the whole amount of the annual rents due and to become due upon the said lease, until they receive full payment and satisfaction of their said several debts above mentioned; and to apply the said annual rents, when received, to the payment of the principal as well as the interest of their said debts, until the same shall be fully paid and satisfied.

That, on the other hand, the said the Trenton Water Power Company claim to be entitled to collect and receive the whole or a large part of the annual rents due and to become due upon the said lease, and insist that the said company, having purchased the real estate, works, and franchises of the said the Trenton Delaware Falls Company, and that their right to have and to receive the rents due and to become due upon the said lease is in no wise affected or impaired by the assignment of the said indenture of lease to the said William Potts, as hereinbefore set forth, and that the said assignment is not valid against or binding upon the said the Trenton Water Power Company, but that the said company are entitled to hold the said lease free and clear of the said assignment, and to receive the rents due and to become due thereon, as though said assignment had never been made; and the said company insist, that if the said assignment is at all valid against and binding upon them,

that then the said William Potts, trustee as aforesaid, is entitled, under the said assignment, to receive only so much (and no more) of the said annual rents as may be sufficient and necessary to pay the interest upon the several debts mentioned and particularly set forth in the said deed of assignment, and which have not been paid or satisfied or assigned to the said the Trenton Water Power Company; and that the said company are entitled to receive the residue of said rents, after deducting therefrom so much as may be necessary for the payment of the interest aforesaid; and that the said rents ought to be apportioned between the said William Potts, trustee as aforesaid, and the said the Trenton Water Power Company; and that so much of the said rent as belongs to the said company should be paid directly to the treasurer of said company, and not to the said William Potts, trustee as aforesaid.

That James M. Redmond, esquire, the president of the said company, has at sundry times informed complainants, or some of them, of the claims of the said company to the said rents, and forbid them to pay the same to the said William Potts, trustee as aforesaid.

That the said the Trenton Delaware Falls Company, in and by the said indenture of lease, did covenant and agree that they would at all times maintain and repair their canal or raceway, and the banks thereof; and if at any time a breach should happen to be made through any part of the said banks, they would repair the same within as short a time as the nature of the case would admit, and if not repaired within thirty days, that then, after the expiration of the said thirty days, the rent reserved by the said lease should abate until the same should be repaired; and that they would be liable to no other damages for any stoppage of the water to be occasioned by their widening, clearing out, or repairing the said canal or raceway, and the works connected therewith, except the abatement of the rent after the end of the said thirty days; and if the same should altogether in any one year (computing the year from the first day of January) continue more than thirty days, that

county of Burlington, and state aforesaid, in the sum of five hundred dollars, to John McKelway, of the city of Trenton aforesaid, in the sum of two thousand dollars, to Timothy Abbott, of the city of Philadelphia, in the state of Pennsylvania, in the sum of five hundred dollars, to Nathaniel Potts, of the same place, in the sum of one thousand dollars, and to Joseph Trotter, of the same place, in the sum of three hundred dollars, amounting in the whole to the sum of six thousand three hundred dollars, for money borrowed of them by the said company to aid in completing their water power at and near the city of Trenton; and are desirous to secure to the said several persons the interest due and to grow due to them, respectively, upon the said several sums of money aforesaid, until the principal thereof shall be fully paid and satisfied," did, in consideration of the matters above set forth and of the sum of one dollar to them paid by William Potts, of the city of Trenton aforesaid, grant, assign, and set over unto the said William Potts the said indenture of lease and all the rent and sum or sums of money due and to grow due thereon, as the same should become due and payable; to have and to hold the same, and to collect and receive the said rents, and every part and parcel thereof then due and owing or which might thereafter become due and payable upon and by virtue of the said lease; in trust nevertheless, in the first place, for the payment of the interest due and to become due to the said Samuel R. Hamilton, Thomas J. Stryker, William Potts, Jasper S. Hill, John Whittaker, John McKelway, Timothy Abbott, Nathaniel Potts, and Joseph Trotter, aforesaid, upon the said several sums of money so due to them as aforesaid, as the same should become due and payable; in the second place, to pay over to the said the Trenton Delaware Falls Company, and to the treasurer thereof, the balance of moneys which should remain in his hands from time to time, as the same should be received from the lessees named in the said lease, their heirs, executors, administrators, or assigns, after satisfying the interest as aforesaid; and in the third place, upon full payment and satisfaction of



the said several debts so due as aforesaid to the parties aforesaid, respectively, or to their legal representatives, by the said the Trenton Delaware Falls Company or their successors, then forthwith to execute a re-assignment of the said deed or indenture of lease, and all the rights, powers, and interests granted by the said assignment to the said company or their successors.

That Fish and Green bought the interest of Grant and Cook; that they ever since have been and now are in the quiet and lawful possession, exercise, and enjoyment of the rights and privileges demised in and by the said lease; and that they have, from time to time, since the said first day of April, eighteen hundred and thirty-eight, paid to the said William Potts, trustee as aforesaid, the said annual rents, as the same became due and payable, up to the first day of January, in the year of our Lord one thousand eight hundred and forty-five.

That John McKelway, one of the persons named in the said deed of assignment, has received full payment and satisfaction of his said debt, therein mentioned, whereby all his interest under the said assignment was extinguished, as by an endorsement in writing upon the said indenture of lease, signed by the said John McKelway, will appear.

That the debt due from the said the Trenton Delaware Falls Company to the said Nathaniel Potts, and mentioned in the said deed of assignment, has been assigned and transferred to the said William Potts, named in the said deed of assignment, by virtue whereof all the interest of the said Nathaniel Potts in and under the said indenture of lease, and the assignment thereof as aforesaid, passed to the said William Potts.

That the debt due from the said the Trenton Delaware Falls Company to the said Joseph Trotter, and mentioned in the said deed of assignment, was, by the said Joseph Trotter, assigned and transferred to the said Timothy Abbott, in the said deed of assignment named, by virtue whereof all the interest of the said Joseph Trotter in and

under the said indenture of lease, and the assigment thereof, as aforesaid, passed to the said Timothy Abbott.

That the said Timothy Abbott departed this life, having first duly made and executed his last will and testament in writing, and therein and thereby appointed Charles H. Abbott and George Abbott the executors thereof; and that the said Charles H. Abbott and George Abbott have taken upon themselves the burthen of the execution of the said will.

That the said the Trenton Delaware Falls Company, having become indebted unto one Isaac Ivins for money borrowed by said company of the said Isaac Ivins, upon the condition that a further interest in the indenture of lease hereinbefore mentioned should be assigned to the said William Potts, to secure the payment of the interest upon said debt to the said Isaac Ivins, the president of the said the Trenton Delaware Falls Company was, on or about the fourteenth day of September, eighteen hundred and thirty-eight, at a meeting of the board of managers of said company, authorized to assign to the said William Potts a further interest in the said indenture of lease, hereinbefore mentioned, for the benefit of the said Isaac Ivins, to secure to him the interest on six hundred dollars, he having advanced that sum for the use of said company.

That the said Isaac Ivins received from time to time of the said William Potts, trustee as aforesaid, out of the annual rents paid to him, the interest upon the said sum of six hundred dollars above mentioned, and that the said Isaac Ivins claims to have an interest in and under the said indenture of lease, and the rents due and to become due thereon, to secure the payment of the interest upon his said debt.

That on or about the ninth day of June, in the year of our Lord one thousand eight hundred and forty-three, the said the Trenton Delaware Falls Company, the lessors in the said indenture of lease named, having become insolvent, James Ewing, Philemon Dickinson, and Samuel S. Stryker, esquires, were appointed by this honorable court receivers



of the said the Trenton Delaware Falls Company, with full power and authority to sell, convey, and dispose of the real and personal estate, franchises, and works of the said company.

That on or about the twentieth day of February, in the year of our Lord one thousand eight hundred and forty-four, the real estate, works, and franchises of the said the Trenton Delaware Falls Company were, by the said receivers, sold at public sale to the highest bidder; and that afterwards, to wit, on or about the eighth day of March, in the year last aforesaid, the said receivers executed and delivered to the purchaser or purchasers thereof a deed of conveyance for the real estate, works, and franchises aforesaid.

That under and by virtue of an act of the legislature of the state of New Jersey entitled, "An act to relieve the creditors of the Trenton Delaware Falls Company," passed the fifteenth day of February, eighteen hundred and forty-four, the purchasers of the real estate, franchises, and works of the said the Trenton Delaware Falls Company were authorized to hold the said real estate, works, and franchises in the same manner that the original stockholders held the same. And in and by the said act it was also, among other things, enacted and provided, that after said purchase, the said company should be known as "The Trenton Water Power Company," and by that name should sue and be sued, and exercise all its corporate powers.

That, under the authority of the act of the legislature above mentioned, the Trenton Water Power Company was organized and went into operation; and that the said the Trenton Water Power Company now hold, possess, occupy, and enjoy the real estate, works, and franchises of the said the Trenton Delaware Falls Company; and, by reason thereof, claim to be the landlords of complainants in the place of the said the Trenton Delaware Falls Company, the lessors named in the said indenture of lease, and to be entitled to collect and receive the rents due and to become due from them.

That they have been informed and believe that Thomas J. Stryker, one of the persons mentioned in the said deed of assignment, and for whose benefit the same was made, has assigned and transferred all his interest in and under the said indenture of lease, and the assignment thereof as aforesaid, unto the said the Trenton Water Power Company, or to James M. Redmond, esquire, the president of the said company, for their use.

That the said William Potts, to whom the said indenture of lease was assigned in trust as aforesaid, claims to be entitled, in behalf of himself and of the said Samuel R. Hamilton, Jasper S. Hill, John Whittaker, Isaac Ivins, and Charles H. Abbott and George Abbott, executors of the last will and testament of the said Timothy Abbott, deceased, to collect and receive the whole amount of the annual rents due and to become due upon the said lease, until they receive full payment and satisfaction of their said several debts above mentioned; and to apply the said annual rents, when received, to the payment of the principal as well as the interest of their said debts, until the same shall be fully paid and satisfied.

That, on the other hand, the said the Trenton Water Power Company claim to be entitled to collect and receive the whole or a large part of the annual rents due and to become due upon the said lease, and insist that the said company, having purchased the real estate, works, and franchises of the said the Trenton Delaware Falls Company, and that their right to have and to receive the rents due and to become due upon the said lease is in no wise affected or impaired by the assignment of the said indenture of lease to the said William Potts, as hereinbefore set forth, and that the said assignment is not valid against or binding upon the said the Trenton Water Power Company, but that the said company are entitled to hold the said lease free and clear of the said assignment, and to receive the rents due and to become due thereon, as though said assignment had never been made; and the said company insist, that if the said assignment is at all valid against and binding upon them,



that then the said William Potts, trustee as aforesaid, is entitled, under the said assignment, to receive only so much (and no more) of the said annual rents as may be sufficient and necessary to pay the interest upon the several debts mentioned and particularly set forth in the said deed of assignment, and which have not been paid or satisfied or assigned to the said the Trenton Water Power Company; and that the said company are entitled to receive the residue of said rents, after deducting therefrom so much as may be necessary for the payment of the interest aforesaid; and that the said rents ought to be apportioned between the said William Potts, trustee as aforesaid, and the said the Trenton Water Power Company; and that so much of the said rent as belongs to the said company should be paid directly to the treasurer of said company, and not to the said William Potts, trustee as aforesaid.

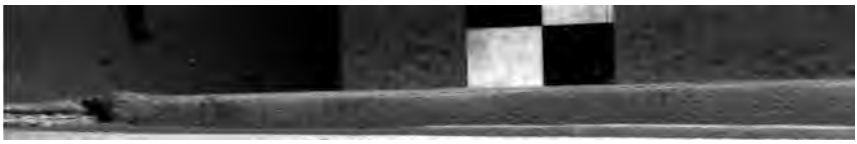
That James M. Redmond, esquire, the president of the said company, has at sundry times informed complainants, or some of them, of the claims of the said company to the said rents, and forbid them to pay the same to the said William Potts, trustee as aforesaid.

That the said the Trenton Delaware Falls Company, in and by the said indenture of lease, did covenant and agree that they would at all times maintain and repair their canal or raceway, and the banks thereof; and if at any time a breach should happen to be made through any part of the said banks, they would repair the same within as short a time as the nature of the case would admit, and if not repaired within thirty days, that then, after the expiration of the said thirty days, the rent reserved by the said lease should abate until the same should be repaired; and that they would be liable to no other damages for any stoppage of the water to be occasioned by their widening, clearing out, or repairing the said canal or raceway, and the works connected therewith, except the abatement of the rent after the end of the said thirty days; and if the same should altogether in any one year (computing the year from the first day of January) continue more than thirty days, that

there should be an abatement of rent in like manner as if the said thirty days had been at one time or in immediate succession.

That during the summer of eighteen hundred and forty-five, the Trenton Water Power Company were engaged about three months in widening, clearing out, and repairing the raceway of the said company, and the works connected therewith, and that during the whole space of three months aforesaid the water in said raceway was stopped and cut off.

That they have paid the rent reserved upon the said lease up to the first day of January, eighteen hundred and forty-five, as hereinbefore mentioned; but that no part of the rent from the said first day of January to the first day of July, eighteen hundred and forty-six, being one and a half years, or six quarters' rent upon the said lease, has been paid by them; and that the said six quarters' rent, amounting to seven hundred and fifty dollars, after deducting therefrom the said sum of eighty-three dollars and thirty-three cents, for the abatement of the rent according to the terms of the said lease, is now due and owing from complainants upon the said lease, and they are and at all times have been ready and willing to pay the same to whomsoever shall appear to be entitled thereto, and were in hopes they should not have been harrassed with any legal proceedings in order to compel the payment of such rent; and that the said parties would have settled their disputes and adjusted their claims among themselves, as in justice and equity they ought to have done, but that the said William Potts, trustee as aforesaid, in behalf of himself and the said Samuel R. Hamilton, Jasper S. Hill, John Whittaker, Isaac Ivins, and Charles H. Abbott and George Abbott, executors as aforesaid, threaten and intend to proceed at law against them; and refuse to consent, although requested so to do, that complainants should pay the same to the said William Potts, trustee as aforesaid, and insist that they should pay the said rent, or a large part thereof, to the treasurer of the said company; and, by reason that the defendants persist in their adverse claims before mentioned, complainants are



unable to ascertain with certainty to which of the said parties the said rents do justly and of right belong, and are advised that they cannot with safety pay the same to any of the defendants, but that the said parties ought to interplead together touching their rights to the said rent, in order that complainants may know to whom the same ought to be paid; and that the said defendants ought to be restrained, by the order and injunction of this honorable court, from prosecuting or commencing any action or actions at law against complainants for or in respect of the matters aforesaid.

The Trenton Water Power Company by their answer, admit that the Trenton Delaware Falls Company were incorporated at the time, in the manner, and for the purpose, and that they were organized and went into operation, as in the complainants' bill of interpleader is stated and set forth.

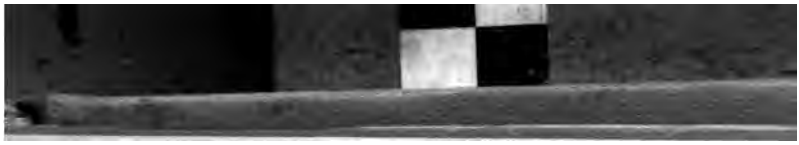
That the said the Trenton Delaware Falls Company made and executed to Benjamin Fish, Charles G. Green, William Grant, and William G. Cook such lease, about the time for that purpose in the said bill of interpleader mentioned, as is therein alleged, and upon the annual rent, and payable in such manner as in said bill mentioned.

That the said the Trenton Delaware Falls Company did assign the said lease to the said William Potts in trust, in the first place, to secure the payment of the interest due and growing due to certain creditors of the said company; in the second place, to pay over to the said the Trenton Delaware Falls Company the balance of money which should remain in his hands from time to time, as the same should be received from the said lessees, after satisfying the interest aforesaid; and in the third place, upon full satisfaction of the said several debts so due to the parties, then forthwith to execute a re-assignment of the said lease to the said company: but as to the date or more particular terms of the said assignment, or the amount of the debts the interest upon which it was intended to secure, or who were then or are now the holders of said claims, or what

part thereof are still unpaid, they have no certain knowledge, and cannot state, as to their belief or otherwise, except that they have understood and believe it to be true, as stated in the complainants' bill, that John McKelway was one of the persons named in the said assignment, and that he has received full payment and satisfaction of his debts therein mentioned; and that Thomas J. Stryker was another of the persons mentioned in said assignment, and that he has assigned and transferred all his interest in and under the said assignment to these defendants.

They admit it to be true, as stated in the complainants' bill, that William Grant and William G. Cook, two of the original lessees in the said lease, on or about the time for that purpose stated in said bill, sold and transferred their interest in said lease to Benjamin Fish and Charles G. Green, and that the said Benjamin Fish and Charles G. Green sold and transferred an interest therein to George S. Green, and that the said Benjamin Fish, Charles G. Green, and George S. Green have ever since been and now are in the quiet and lawful possession, exercise, and enjoyment of the rights and privileges demised in and by the said lease; but are ignorant as to the precise amount of rent paid by them upon the said lease, or to what time the same has been paid up, and cannot state, as to their belief or otherwise, but leave the same to be proved as the court may direct.

They neither admit nor deny that the said the Trenton Delaware Falls Company became indebted to Isaac Ivins, and that the president of said company was authorized to assign to the said William Potts a further interest in the said lease for the benefit of the said Isaac Ivins, to secure to him the interest on six hundred dollars, nor do they know whether any such assignment was ever in fact made, or whether said Ivins has received any, or if any what part, of the interest above mentioned from the said William Potts; but they believe that said Ivins does claim to have an interest in said lease and the rent due and to become due,



to secure the interest upon some debt alleged by him to be due him from said company.

They admit that, about the time in said bill for that purpose mentioned, the said the Trenton Delaware Falls Company having become insolvent, James Ewing, Philemon Dickinson, and Samuel S. Stryker, esquires, were appointed receivers of said company by this honorable court, with full power and authority to sell, convey, and dispose of the real and personal estate, franchises, and works of the said company, as in and by the bill is stated.

They further say, that at the time of the appointment of the said receivers, the said the Trenton Delaware Falls Company were indebted to sundry persons in an amount greatly exceeding the value of their real and personal estate, franchises, and works, to wit, in the sum of more than one hundred thousand dollars; that one Robert McCall held a mortgage, duly acknowledged and recorded, upon a large part of the real estate of said company, to secure the sum of three thousand three hundred dollars, being part of the purchase money of said real estate; that the Trenton Banking Company held a mortgage, duly acknowledged and recorded, upon all the lands and raceway of said company, dated the second day of April, eighteen hundred and thirty-three, to secure the sum of four thousand dollars, and another mortgage, also duly acknowledged and recorded, on the same, of the same date, to secure the further sum of six thousand seven hundred dollars; and that the said the Trenton Banking Company had also a judgment against the said the Trenton Delaware Falls Company recorded in the supreme court of judicature of this state on the twenty-second day of May, eighteen hundred and thirty-four, for the sum of six thousand two hundred and thirty-seven dollars and fifty-seven cents, which was a lien on all the real and personal property of said company; that Thomas Cadwalader and others had a mortgage, duly acknowledged and recorded, upon all the real estate of the company north of the Assanpink creek, bearing date the twenty-third day of May, eighteen hundred and thirty-four, to secure the

sum of fifteen thousand four hundred and ninety-one dollars and forty-seven cents; upon all which said several mortgages and judgment a very large amount of interest had accrued, and which were existing liens at the time of the alleged assignment of the said lease of the complainants to the said William Potts, trustee as aforesaid, on the real estate, raceway, and property of the said company.

That subsequent to the date of the alleged assignment of the said lease, the said the Trenton Delaware Falls Company, to wit, on the second day of June, eighteen hundred and thirty-six, made and executed a mortgage to Benjamin Fish and others to secure the sum of nine thousand two hundred and twenty-seven dollars and ninety-seven cents, which was also duly acknowledged and recorded, and embraced a large portion of the real estate, including the raceway of the said company; that, on the fourth day of the same month and year last aforesaid, the said company made and executed a mortgage to Armitage Green and others to secure the sum of seven thousand three hundred and ninety-five dollars and forty-five cents, which was also duly acknowledged and recorded, and embraced the same property of the said company covered by the mortgage of Benjamin Fish and others; that, on the third day of June, eighteen hundred and thirty-seven, the said company made and executed a mortgage to Samuel S. Stryker, trustee, &c., to secure the sum of ten thousand dollars on all the real estate of the said company, which was also duly acknowledged and recorded; and that, on the twenty-first day of February, eighteen hundred and forty-three, the said Samuel S. Stryker entered up judgment on the bond accompanying said mortgage, in the inferior court of common pleas in and for the county of Mercer, for the sum of seven thousand nine hundred and thirty-five dollars and thirty cents, being the amount then due on the said bond; that, on the twenty-third day of February, eighteen hundred and forty-three, the said company made and executed a mortgage to Richard J. Bond on all the real estate of the said company, to secure the sum of twenty thousand four



hundred and fifty dollars and seventy-four cents, which mortgage was duly acknowledged and recorded; that, on the twenty-eighth day of February, eighteen hundred and forty-three, three several judgments were obtained against the said company, in the supreme court of judicature of this state—one in favor of Peter T. Smith, for the sum of three thousand nine hundred and thirteen dollars and three cents, one in favor of Patrick Mahan, for the sum of four hundred and seventy-eight dollars, and one in favor of Andrew Carrigan, for the sum of two thousand seven hundred and eighty dollars.

That all the hereinbefore mentioned mortgages and judgments were existing liens upon the real estate of said company at the time of the appointment of the receivers as aforesaid; that large arrearages of interest had accrued upon them, and that, independent of the simple contract debts not secured by mortgages or judgment liens, they amounted to a sum greatly beyond the real value of all the estate and property of said company.

That the receivers, so appointed as aforesaid by this honorable court, having reported to this court that it was necessary that the real estate, corporate rights, and other property of the said company should be sold, and the proceeds applied to pay the debts of said company, an order or decree was made by the chancellor, on the seventh day of November, eighteen hundred and forty-three, directing the said receivers to proceed and make sale according to law of all and singular the lands, tenements, hereditaments, and real estate of the said company, and all the chartered rights, privileges, and franchises belonging to them and appertaining to their raceways, and all the right, title, and interest of said company of, in, and to the same; and the said receivers having represented to the legislature of this state that the property of the said the Trenton Delaware Falls Company was encumbered for more than it would bring at public sale, that it was doubtful whether the same could be sold without legislative aid, and that the interests of the creditors of said company would be promoted by a sale of

such real estate, franchises, and works, clear of all encumbrance, the said legislature, on the fifteenth day of February, eighteen hundred and forty-four, passed the act, referred to in the complainants' bill, entitled "An act to relieve the creditors of the Trenton Delaware Falls Company," in and by which act the said receivers were not only authorized to sell the real estate, franchises, and works of the said company at public sale to the highest bidder, but were authorized to sell the same free and clear of all encumbrance, and to make to the purchaser thereof as good and sufficient a title in law as the said company had in said real estate, franchises, and works, free and clear of all mortgages, judgments, or other liens whatever, the purchasers to hold the said works, franchises, and real estate as a joint stock company, in the same manner as the original stockholders held the same; that, after said purchase, the said company should be known as "The Trenton Water Power Company," and by that name might sue and be sued, have a common seal, and exercise all its corporate powers; but that nothing in said act should be construed to affect the rights of the several creditors of the said the Trenton Delaware Falls Company to receive their distributive share of the proceeds of the said sale according to law, or to invalidate any existing lease made by said company, or assignment thereof, as by the said act of the legislature, now in the possession of these defendants, reference being thereunto had, will appear.

They admit, that on or about the twentieth day of February, in the year of our Lord eighteen hundred and forty-four, the said receivers did sell all the real estate, works, and franchises of the said the Trenton Delaware Falls Company, as stated in said bill, and executed and delivered to the purchaser thereof a deed of conveyance for the same; and that the purchaser, in pursuance of the act of the legislature hereinbefore mentioned, organized himself and his associates in said purchase into a corporation, by the name of "The Trenton Water Power Company;" and that they are the same company, and now hold, possess, occupy, and



enjoy the said estate, works, and franchises of the said the Trenton Delaware Falls Company, and claim to be the landlords of the said complainants, in place of the said the Trenton Delaware Falls Company, and to be entitled to collect and receive the rents due and to become due from the complainants upon the said lease.

That the said receivers sold the said real estate, works, and franchises of the said the Trenton Delaware Falls Company free and clear of all mortgages, judgments, or other liens whatever, as they were directed and authorized to do; that said sale was confirmed by this honorable court, and the deed therefor, conveying said property as aforesaid, was made by order of the court, and the purchase money paid over to said receivers on delivery of said deed, and that, by the express terms of said deed and the said act of the legislature aforesaid, these defendants hold the said property free and clear of all encumbrances created by the said the Trenton Delaware Falls Company, and subject only to the right, as they humbly submit, of the lessees of the Trenton Delaware Falls Company and the assignees of such lessees to draw water from the raceways of these defendants, in the manner prescribed by their leases, upon their paying the rents and performing the duties reserved therein to these defendants.

That they have understood and believe, and therefore admit, that the said William Potts claims, in behalf of himself and his *cestui que trusts*, to be entitled to collect and receive the whole amount of the annual rents due and to become due upon the said complainants' said lease, until they receive full payment and satisfaction of their debts, as mentioned in said bill; but humbly insist that the said William Potts, as trustee as aforesaid, is not entitled to receive the said rents, or any part thereof; and they admit that they claim to be entitled to said rents which have accrued since the day of the date of their purchase aforesaid, and have given notice to the complainants of their said claim, and requested them not to pay over the said rents, or any part thereof, to the said William Potts, trustee as aforesaid.

They further say, that the whole real estate and property of the said the Trenton Delaware Falls Company was encumbered with mortgage and judgment liens, as herein before stated, at the time they made the said assignment of the complainants' lease to the said William Potts, as aforesaid, to an amount which, with the interest and cost accrued thereon, has exhausted the whole of the purchase money, being fifty thousand dollars, paid for said real estate and property at the receivers' sale, and that said company, after the date of the assignment aforesaid, encumbered their real estate and property to a very large additional amount, by giving other mortgages and contracting debts upon which other judgments were obtained against them, none of which encumbrances so subsequently contracted have ever been paid, except some portion of the judgment of Peter T. Smith; and that it was in consequence of the existence of these large encumbrances, greatly exceeding the value of the work, that the legislature, upon the representations of the receivers, passed the act authorizing the sale to be made free and clear of all encumbrances whatever; and they respectfully submit that the reservation in the said act of the legislature, hereinbefore mentioned in favor of the leases of the company, and the assignment thereof, was not intended to set up the said assignment to the said William Potts, trustee as aforesaid, of the lease made to the complainants, as an encumbrance upon said real estate and property prior to all the legal encumbrances existing upon the same, and that the legislature had no constitutional right or power to do so, even if they had so intended.

They submit, that the said assignment of said lease created no legal encumbrance whatever upon the said real estate and property of the said company, and the said William Potts and those who claim under him as *cestui que trusts* never had any of their said claims secured by mortgage or judgment against said Trenton Delaware Falls Company, but were creditors at large, and only entitled, after the sale as aforesaid, to be paid *pro rata* with other creditors at large of said company, after all the mortgage and judgment creditors were



satisfied out of the proceeds of said sale; and that the whole real estate and property of said company, having been sold as aforesaid free and clear of encumbrances, and the purchase money exhausted in the satisfaction of existing liens, the said trustee and those whom he represents are not entitled to have their debts charged upon the estate so purchased in their hands, which is in effect the claim set up by the said William Potts and those who hold under him as *cestui que trusts*.

They admit, that the said the Trenton Delaware Falls Company, in and by the said indenture of lease to the complainants, did covenant and agree that they would at all times maintain and repair the canal and raceway, and the banks thereof; and if at any time a breach should happen to be made through any part of the said banks, they would repair the same, as stated in said bill, and if not repaired within thirty days, then, that after the expiration of the said thirty days, the rent reserved by the said lease should abate until the same should be repaired, and lessors be liable to no other damage; and that any lost time over and above thirty days in the whole, in any one year, should entitle the complainants to an abatement of rent for the time so lost; and they further admit that, during the summer of the year eighteen hundred and forty-five, they were engaged in widening, clearing out, and repairing their said raceway, but they deny that they were so engaged for three months in said work, or that the water in said raceway was stopped and cut off from the complainants' mill for that space of time, on the contrary they say that the water was stopped or cut off from the complainants' mill for the space of two months and fifteen days only, for which time, deducting one month, they admit that the complainants are entitled to an abatement.

William Potts, trustee, Samuel R. Hamilton *et al.*, in answering say, they admit that the Trenton Delaware Falls Company were, by an act of the legislature of the state of New Jersey, incorporated and created a body politic and corporate, as in the said bill is set forth, and that the said

They further say, that the whole real estate and property of the said the Trenton Delaware Falls Company was encumbered with mortgage and judgment liens, as herein before stated, at the time they made the said assignment of the complainants' lease to the said William Potts, as aforesaid, to an amount which, with the interest and cost accrued thereon, has exhausted the whole of the purchase money, being fifty thousand dollars, paid for said real estate and property at the receivers' sale, and that said company, after the date of the assignment aforesaid, encumbered their real estate and property to a very large additional amount, by giving other mortgages and contracting debts upon which other judgments were obtained against them, none of which encumbrances so subsequently contracted have ever been paid, except some portion of the judgment of Peter T. Smith; and that it was in consequence of the existence of these large encumbrances, greatly exceeding the value of the work, that the legislature, upon the representations of the receivers, passed the act authorizing the sale to be made free and clear of all encumbrances whatever; and they respectfully submit that the reservation in the said act of the legislature, hereinbefore mentioned in favor of the leases of the company, and the assignment thereof, was not intended to set up the said assignment to the said William Potts, trustee as aforesaid, of the lease made to the complainants, as an encumbrance upon said real estate and property prior to all the legal encumbrances existing upon the same, and that the legislature had no constitutional right or power to do so, even if they had so intended.

They submit, that the said assignment of said lease created no legal encumbrance whatever upon the said real estate and property of the said company, and the said William Potts and those who claim under him as *cestui que trusts* never had any of their said claims secured by mortgage or judgment against said Trenton Delaware Falls Company, but were creditors at large, and only entitled, after the sale as aforesaid, to be paid *pro rata* with other creditors at large of said company, after all the mortgage and judgment creditors were



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ranchises, and works of the said company; that
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Trenton Delaware Falls Company;" they
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the whole of the said rent cannot be de-
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company was organized and went into operation under said act; that, on the day in the said bill mentioned, the said company, of the one part, and Benjamin Fish and Charles G. Green, together with one William Grant and one William G. Cook, of the other part, made and executed a certain lease, by which the said company did demise and lease unto the said Benjamin Fish, Charles G. Green, William Grant, and William G. Cook, and to their heirs and assigns, the rights and privileges in said bill set forth and more particularly mentioned in said lease; that the said lease was duly assigned by the said company to William Potts, in trust for the persons, uses, and purposes in said bill set forth; that the said Benjamin Fish, Charles G. Green, William Grant, and William G. Cook paid to the said trustee the said rent, as in said bill is stated, and that, at or about the time mentioned in the said bill, the said William Grant and William G. Cook assigned all their right, title, and interest under said lease to the said Benjamin Fish and Charles G. Green, who afterwards transferred an interest therein to George S. Green; that the complainants have had lawful and quiet possession under said lease, and that they have paid the annual rent thereon up to the first day of January, eighteen hundred and forty-five.

That they have heard and believe, and therefore admit to be true, that the interest of John McKelway in the said lease assigned as aforesaid has been extinguished; that the debt due from the said company to Nathaniel Potts, mentioned in the said deed of assignment, has been transferred to the said William Potts, by virtue whereof all the interest of the said Nathaniel Potts in and under the said indenture of lease and the assignment thereof, has passed to the said William Potts, and in like manner all the interest which Joseph Trotter had in said lease and deed of assignment was transferred to Timothy Abbott, who has departed this life, first having appointed, by his last will and testament, duly made and executed, Charles H. Abbott and George Abbott the executors thereof; that the said company became insolvent, and thereupon receivers were appointed by this honorable



court, with authority to sell and dispose of the real and personal estate, franchises, and works of the said company; that the said real estate, works, and franchises were sold, as in said bill is set forth; they admit the passage, by the legislature of this state, of the act entitled, "An act to relieve the creditors of the Trenton Delaware Falls Company;" they have heard and believe, and therefore admit, that under and by virtue of the said act of the legislature the Trenton Water Power Company was organized, and that they now hold, possess, and occupy, and enjoy the real estate, works, and franchises of the said the Trenton Delaware Falls Company; that they have heard and believe, and therefore admit, that the said Thomas J. Stryker has transferred all his interest in the said lease and deed of assignment to the Trenton Water Power Company; that the said deed of assignment of the said lease was executed to the said William Potts, as trustee as aforesaid, upon the consideration of the loaning by these defendants, respectively, to said the Trenton Delaware Falls Company of the several sums in said deed of assignment mentioned, which sums were paid by these defendants to the managers of the said company, and by them expended in repairing and improving the works of the said company, as they are informed and believe, these defendants receiving no other security for the payment of the principal moneys constituting said loans, and the interest thereon, than the said lease, assigned as aforesaid; that the said deed of assignment conveys to their said trustee the entire rent reserved in said lease, whether due or to become due, and conferred upon him full power to collect the same; and they deny that the said the Trenton Water Power Company are the landlords of the said complainants, or have any right or authority to demand the said rent of the said complainants, or any part thereof.

They insist, that the said lease was assigned to their said trustee to secure as well the principal of their said loans as the interest thereon, and that the absolute power of the said trustee to collect the whole of the said rent cannot be defeated in any other way than by the full payment and satis-

faction to these defendants, respectively, of the said several loans in the said assignment mentioned.

They insist, that the said complainants are bound to pay the entire rent reserved in their said lease, at the times and in the manner prescribed by said lease, to the said William Potts, as trustee, whose duty it is, as fast as he collects the same, to pay thereout the interest which shall be then due to Samuel R. Hamilton, Jasper S. Hill, John Whittaker, William Potts, both on his original loan and on that purchased by him of Nathaniel Potts, to the Trenton Water Power Company, as assignee of Thomas J. Stryker, to the executors of Timothy Abbott, deceased, both upon the original loan of the said deceased and upon that purchased by him of Joseph Trotter; und, having paid the interest upon said loans, then to pay the balance, if any remaining in his hands, towards the payment and satisfaction of the said principal sums.

That, by the terms of the said deed of assignment, the said trustee was directed, after paying out of the proceeds of the said rent the interest on the principal sums in said deed mentioned, to pay the balance of money which shall remain in his hands from time to time, as the same shall be received from the said lessees, their heirs, executors, administrators, or assigns, to the Trenton Delaware Falls Company, and to the treasurer thereof; that out of this balance the said the Trenton Delaware Falls Company made, they are informed and believe, some oral provision for the payment of said debt due by them, or the interest accruing upon some debt due by them to the said Isaac Ivins; but they insist that there was no legal assignment made to the said Ivins, and that they were not consulted in the making of said arrangement or provision, and had no knowledge thereof at the time such arrangement or provision was made, and that they are not bound thereby; but that the said the Trenton Delaware Falls Company being no longer competent, by themselves or their treasurer, to receive the said balance, the same may rightly be retained by said trustee, to be applied in the payment of the principal sums in said deed of assignment named.



That the said William Potts, as trustee as aforesaid, has faithfully performed the duties imposed upon him by said trust, and up to the time in said bill of complaint mentioned, to wit, the first day of January, eighteen hundred and forty-five, has collected the said rent to the use of the said *cestui que trusts*.

They admit, that for the stoppage of water occasioned by the widening, clearing out, or repairing the said canal or raceway, and the works connected therewith, after the expiration of thirty days in any one year, computing the year from the first of January, the rent is to abate until the water is again supplied; but whether the water was stopped from the mill of the said complainants during the said period of thirty days in any one year since the failure on their part to pay their rent, or how long or for what purpose the said water may have been stopped in any one year, they do not know and cannot answer, but leave the said complainants to prove the same as this honorable court shall direct.

Replications in the usual form were filed.

Joseph C. Potts and *Williamson*, for complainants.

Stacy G. Potts, for defendants.

HALSTED, CHANCELLOR. I see no way in which I could decree that the rents be paid to William Potts, trustee, &c., but by declaring the receivers' sale void; or, that it was made subject to encumbrance, and that the purchasers at the receivers' sale took it subject to all encumbrances, and subject, too, to the pledge, if it be such, of the rents receivable from Fish & Green, to pay the interest of the debts named in what is called the assignment to Potts, trustee, &c., of the lease made to Fish & Green.

But the receivers' sale was made free and clear of all encumbrances, and was confirmed by the court. It cannot now be disturbed by any action of this court. An appeal should have been taken from that decree of confirmation, as the

only mode of correcting it, if it was wrong. I cannot now declare that the sale was made subject to encumbrances.

From some facts stated in argument, it would seem that, when the act for the sale free from encumbrances was applied for, it was understood by the parties applying for it that Potts, trustee, &c., should not be affected in his right to receive the rents from Fish & Green, for the purposes stated in what is called the assignment to him of the lease to Fish & Green; and I can very well imagine that the language used in the proviso of that act was understood by the parties applying for the act, or by those interested in the rents derivable from that lease, to be sufficient to protect Potts, trustee, &c., in the receipt of those rents. But I do not see that the court is at liberty to inquire what any person soliciting the passage of an act, or assenting to its passage, understood to be the meaning of its language. And, again, such understanding would not affect the purchasers at the receivers' sale, or prior or subsequent mortgages of the property.

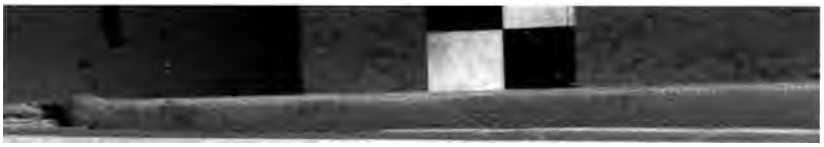
My conclusion on the re-hearing is the same as on the first hearing—that the Water Power Company are entitled to the rents.

Order accordingly.

The opinion of the court was delivered by

GREEN, C. J. Two questions are presented for the consideration of the court, viz:—First, whether the act of the fifteenth of February, eighteen hundred and forty-four, entitled, "An act to relieve the creditors of the Trenton Delaware Falls Company," is a constitutional and valid act, and if it be, then, second, whether the right of the appellant to receive the rents assigned to him by the company, is secured by the provision of the third section of the act.

I. The act is alleged to be unconstitutional, upon the ground that it impairs the obligation of contracts. The company, at the time of the passage of the act, was insolvent. Its assets were in the hands of receivers. As the law stood



prior to that time, the receivers were authorized to sell the property of the corporation, subject to encumbrances. But the property being encumbered far beyond its value, no sale could be effected through the agency of the receivers. From the character of the work, and the nature of the encumbrances upon it, a sale by the ordinary process of law, upon proceedings instituted against separate portions of the work at the instance of separate encumbrancers, if at all practicable, would inevitably have involved loss to all parties concerned. The design and operation of the act was to effect an immediate sale of the entire work, in the most advantageous manner. It effected promptly, through the agency of the receivers, what must otherwise have been accomplished at the cost of much delay and expense, through the ordinary process of law. It left the proceeds of the sale in the hands of the court of chancery, to be disposed of according to the rights of the respective parties, as it would have been, had the property been sold under foreclosure. The act was designed to be in aid of the creditors of the company. Its design is not to invalidate any contracts, but to enforce them—not to impair any securities, but to aid in obtaining the benefit of them. It in no wise interferes with the obligation of any contract. It effects only the remedy.

But it is said that the interest assigned to the appellant was a franchise, which could not be sold or taken by virtue of the previous mortgage, by the ordinary process of law, and that, therefore, the act which authorized a sale of the property clear of the appellant's interest, impaired the obligation of his contract. The first answer to the objection would seem to be, that if the encumbrance of the assignee of the rent was of a higher nature than the mortgage upon the work, or existed independent of that mortgage, the ground of complaint is not against the act, but against the order in which the assets were marshalled. The appellant was not, by the decree of the chancellor, assigned the priority in the distribution of the fund, to which by law and by the provisions of this very act, he was entitled. The relief should have been sought against that decree.

But the answer may be placed upon broader ground. The rent of the water is not a franchise, nor is the right to receive or demand it a franchise. The company being authorized to draw the water from the river, and owning the raceway and the land upon which it was constructed, had the right to the use of the water flowing over their land through their raceway, as incident to the ownership of the land—as in fact a part of the land itself.

And a conveyance or mortgage of the land would pass the right to use the water, precisely as the conveyance of all other land passes the right to the use of the water flowing over it. That the right to draw the water from the river was derived from the state will not alter its character, nor will it convert the rent derived from it, or the right to receive the rent, into a franchise, any more than the right to receive rent from land purchased from the state, is a franchise.

The charter of the society for establishing useful manufactures, (*Paterson* 104,) contains no power to sell or lease water privileges. They have simply a power to acquire, hold, and dispose of real estate. They lease and sell water power by virtue of the ownership of the land and their right to exercise this power has been repeatedly recognized, both by the court of chancery and by the supreme court.

The entire property of the Water Power Company, its lands, its raceway, and its water power was subject to encumbrances by mortgage and judgment prior not only to the assignment to the appellant, but prior to the lease itself under which he claims. Clearly, whatever the nature of the interest of the assignee of the rent may have been, legal or equitable, it was subject to prior encumbrances, by virtue of which, not only the assignment, but the lease itself, might have been extinguished. It would seem to be totally immaterial whether the previous encumbrance be satisfied by a sale, or a sequestration of the property of the company. But if it be material, it follows from what has been already said, that the right to receive the rents would have passed with the title to the work itself. So that the prior mort-



gages and judgments were not only liens upon the work, and entitled the holders in equity to the rents and profits, but the mortgagees and judgment creditors had the right and the power, by the ordinary process of law, to extinguish the lease and the rights of the assignee consequent upon it.

It is said, again, that the act is illegal, because it confounds the rights of encumbrancers upon the property, by uniting the entire work in one sale, and not disposing of it in distinct portions. This objection touches the policy of the act. But the difficulty of discriminating between the extent of the different encumbrances, and the precise value of each in the distribution of the assets, where the validity of no contract is impaired, cannot affect the constitutionality or validity of the law. Nor is it perceived that the objection, whatever force it might have had, if urged by the mortgagees or judgment creditors, lies in the mouth of the appellant in this case, whose interest was in no wise affected by it.

Again, it is said that the act is unconstitutional because it reserved and protected existing leases from the operation of the sale. But the act confers no new right upon the lessee. It confers no additional validity on the lease. It simply declares that nothing in the act shall be construed to invalidate existing leases. It leaves the right of the lessees precisely as they stood before the passage of the act.

But it is said that the act itself was designed to protect, and does in terms protect, the claim of the appellant.

The act provides that nothing therein contained shall be construed to invalidate any existing leases made by said company, or assignments thereof. It is contended that the effect of that provision is, that rents assigned remain an encumbrance upon the work, notwithstanding the sale, and that it was the design of the legislature to protect them. A lease is the conveyance of land rendering rent. The term is frequently used to designate the interest of the tenant; and when the statute speaks of the mortgage of a lease, (*Rev. St.* 89, § 9,) of the assignment of a lease, (*Rev. St.* 503, § 10) or of the surrender of a lease, it always refers to the interest of the lessee in the contract, not the rent derivable from the

lease. The assignment of a lease is properly the transfer of the interest of the tenant. This is its popular, as well as its appropriate and legal meaning. But it is said that the legislature, in the act now under consideration, used the phrase in a different and broader sense, designing to include an assignment by the landlord of the rent, as well as an assignment by the tenant of his interest in the premises. If it be clear that the legislature used it in such sense, it must be construed accordingly.

The legal import of the language applies to the interest of the tenant, not to that of the landlord. To warrant a different construction, the intention of the legislature should be clear and unequivocal. There is no evidence of such intention, in the language of the act. It must be found, if any where, in the reason and spirit of the enactment. But it is difficult to perceive why the legislature should have designed to protect the claims of the landlords, while the motives for protecting the interest of the tenants are sufficiently obvious. The tenants, upon the faith of their leases or contracts with the company, had made costly erections and improvements; some of them held by virtue of contracts prior to any encumbrance upon the work. Their priority could not be disturbed. All of them had strong claims in equity. The improvements which they had made, and the rents they were paying, constituted in great measure the value of the work. If the leases were made for a fair consideration, rendering a just rent, the tenants had the strongest claim in justice and equity that the value of their improvements should not be lost, even as against prior encumbrances; but that their title should be preserved, and the rents be appropriated in satisfaction of prior claims. Protection to the original tenants, or to their assignees, who made such improvements, was equitable and just. But upon what ground should or could the legislature have protected the right of the landlords or their assignees to receive the rents? If the act protects the assignee of the landlord, it protects the landlord. If it protects the assignee of the rent, it protects the rent also. The language of the act is, that nothing in the act shall be con-



strued to invalidate leases made by said company, or assignments thereof. If the assignment of leases means the assignment of the landlord's interest, the lease must mean the landlord's interest. But surely the legislature never intended to protect the rents in the hands of the landlord. That would have been most effectually to impair the validity of contracts, and to take from the encumbrancers all the value of their security. It would have sold the work, but secured its entire value and income, not to the purchaser but to the company and to their assignees. The law will admit of no such construction. Upon such interpretation, its provisions would neither be rational nor constitutional. It would violate alike the plain dictates of justice and the letter of the constitution.

The reason and spirit of the law, no less than its language, require that the assignments of leases should be construed to refer to the transfer of the rights of the tenants, and not to a mere assignment of the rent. Upon this interpretation the act is clearly constitutional. It violates no principle of justice. If made with the assent of the prior encumbrances, it conflicts with no rule of law.

The title of the appellant to receive the rent, by virtue of the assignment, is not saved from the operation of the sale. The equities, if any, of the party have been, or might have been, protected in the court of chancery upon the distribution of the assets. All equities appear to have been thus protected. The appellant and his *cestui que trusts*, like many other honest creditors, have lost their claim, not from any illegality or want of equity in the statute, but because their security was inadequate.

The decree must be affirmed, with costs.

Decree accordingly.

Decree of the Chancellor affirmed unanimously.

SAMUEL FLEISCHMAN, appellant; and CHARLES E. YOUNG and others, respondents.

Although the general rule is, that when the equity of the bill is answered, the defendant is entitled to the benefit of his answer, and the injunction should be dissolved; the rule is subject to exceptions. The motion is addressed to the sound discretion of the court, which should always be exercised with a proper regard to well established rules, but not in such slavish obedience to them as to defeat the ends of justice.

So, in a case where if the motion prevailed the cause was virtually decided, and the complainants would be deprived of their only remedy, and the answers showed circumstances enough for a well founded belief that they did not give the true character of the transaction; although they technically denied the equity of the bill, the court would not dissolve the injunction.

* *Quere.* Whether an order refusing to dissolve a temporary injunction pending the suit be properly the subject matter of appeal. Some of the authorities deny that the order *where costs are not allowed* can be the subject of appeal, and that even where costs are allowed, the order upon appeal will be reviewed only upon the question of costs.

The bill in this cause was filed to avoid certain judgments as fraudulent. The injunction, as modified, merely restrained the sheriff from paying over the money received by virtue of the judgment, until the final hearing of the cause. Upon the coming in of the answer, the defendants moved to dissolve the injunction, on the ground that the answer was a full denial of the equity of the bill.

THE CHANCELLOR. The only ground upon which I am asked to dissolve the injunction in this case is, that the equity of the bill is fully answered. As far as respects the judgment of Fleischman, I am unwilling to dissolve the injunction. As to the other judgments, let an order for dissolution be made.

The general rule undoubtedly is, as stated by counsel,

* *See post Att'y Gen'l v. Paterson, and ante Att'y Gen'l and Hud. Riv. R. R. Co.*—[Reporter.



that when the equity of the bill is answered, the defendant is entitled to the benefit of his answer, and the injunction should be dissolved. But the rule is subject to exceptions; and there are many cases in the books where the court, while acknowledging the rule, have notwithstanding felt constrained, from the character of the case and the effect of a dissolution, to deny the motion to dissolve. The motion is addressed to the sound discretion of the court, which should always be exercised with a proper regard to well established rules, but not in such slavish obedience to them as to defeat the ends of justice.

In the case of *Chetwood v. Brittan*, 1 *Green's Ch. R.*, 439, the chancellor declared the answer to be a broad denial of the equity of the bill. He expressed his entire confidence in the integrity of the answer, and his language was, "that the equity of the bill is fully and fairly met by the answer." He refused to dissolve the injunction. He disregarded the general rule, simply upon the ground that the complainant's only remedy was in that suit, and that if the motion to dissolve prevailed, the complainant was remediless.

In this case, if the motion prevails, the cause is virtually decided. The defendant resides out of the state. If he receives the money from the sheriff, the further prosecution of this suit would be fruitless: the complainants are deprived of their only remedy. But this consideration, alone, would not induce me to deny the motion, for, if it did, the refusal should extend as well to the other judgment creditors as to Fleischman.

The impression produced upon my mind by the answer of Fleischman, and of his agent, Isaac Dittenhœffer, is very unfavorable to the defendant. I do not mean to say, that a mere vague suspicion is excited as to the honesty of the transaction, but that the answers show circumstances enough, not for a decided judgment against the *bona fides* of the transaction, but for a well founded belief that the answers do not give its true character. When such an impression is produced upon the mind of the court by the answer, although it may technically deny the equity of the

bill, I do not think the injunction should be dissolved; and more especially when the consequence of such dissolution will be to leave the complainant remediless in the premises.

The property levied upon has been, by the arrangement of the parties, converted into money. The money may be invested, so that no serious loss can accrue to any one from the mere delay occasioned by this suit.

My impression is strong, that there is a misjoinder of complainants; that a judgment and execution creditor cannot unite with a creditor at large in a bill like this. The question was not mentioned on the argument, and I am willing to hear the parties, if they desire it. If my impression is correct, I shall give the complainants leave to amend; or if any of the complainants, who appear in the bill as creditors at large, have since filing the bill obtained judgments, they may bring such fact before the court. In *Edgar v. Clevenger et al.*. 1 *Green's C. R.*, 258, the complainant was permitted, after a decree *pro confesso* against the defendants, and an *ex parte* hearing upon the evidence to file a supplemental bill, in order to incorporate in the record the facts, that after the commencement of his suit in this court, the complainant obtained a judgment and sued out execution at law.

The motion, as to Fleischman's judgment, is denied, but without costs. As to the other defendants, the motion is allowed with costs.

From that part of the interlocutory order which refused to dissolve the injunction which had issued against paying to him the moneys raised upon his execution, Samuel Fleischman appealed to this court.

Zabriskie & W. Pennington for appellants.

Bradley & Frelinghuysen for respondents.

The opinion of the court of appeals was delivered by

GREEN, C. J. This appeal is from an order of the chan-



cellor, refusing to dissolve an injunction upon the coming in of the defendant's answer. The ground of appeal is, that the answer of the defendant, sustained by the accompanying affidavits, is a full denial of the equity of the complainant's bill. The bill was filed to avoid certain judgments as fraudulent. The injunction, as modified, merely restrains the sheriff from paying over the money raised by virtue of the judgment, until the final hearing of the cause. The injunction is merely ancillary to the main purpose of the bill. It retains the fund under the control of the court until the question of right is finally disposed of.

Whether an order refusing to dissolve a temporary injunction pending the suit, be properly the subject matter of appeal, is a point upon which there is some diversity of opinion. Some of the authorities deny that the order where costs are not allowed can be the subject of appeal, and that even where costs are allowed, the order upon appeal will be reviewed only upon the question of costs.

But admitting that where costs are allowed, the appeal lies—it is obvious, that the order of the chancellor should not be interfered with except in a case entirely clear of doubt—and where some principle of law or of equity has been violated by the decision.

Believing that no principle or rule of law or equity was violated by the order of the chancellor, and concurring in the view expressed by him, that the facts of the case warrant the apprehension that the truth is not fully disclosed by the answer, we are of opinion that the chancellor was right in refusing to dissolve the injunction, and that the order should be affirmed with costs.

Decree accordingly.

The decree of the Chancellor affirmed unanimously.

COURT OF ERRORS AND APPEALS.

JUNE TERM, 1854.

Between RICHARD P. THOMPSON, attorney general, at the relation of the Board of Chosen Freeholders of Bergen, the inhabitants of the township of Saddle River, in the county of Bergen, JOHN S. VAN RIPER *et al.*, appellants, and THE PRESIDENT AND COUNCIL OF THE CITY OF PATERSON, respondents.

The object of a preliminary injunction is to prevent some threatening, irreparable mischief which should be averted until opportunity is afforded for a full and deliberate investigation of the case.

Where it does not appear that irreparable mischief is liable to ensue from leaving a party to go on exercising a right he claims, the court never stops him before it has an opportunity of examining the question of right.

The mere *erection* of a house *intended* as a poor and work house, is, in itself, no injury to anybody; nor is the sending of paupers into a township or county illegally, or keeping them there a few months, a case of irreparable mischief.

Where, at the time a preliminary injunction was applied for, the main question in the cause, which was essentially a question of law, was pending before a court of law, the application was refused. The rule has been long established, that in such cases a court of equity does not interfere by injunction until the question of right is determined.

An order of the Chancellor, refusing a preliminary injunction, is appealable where the appellants *are aggrieved* by it—where it touches the merits of the question in the cause—where it is the refusal of a present relief against a present mischief. So where an injunction is the primary object of the bill—where the complainants, if entitled to any relief, are entitled to this—where upon the case made the nuisance complained of is a wrong done to them, and this is the means of restraining it—and where if a nuisance at all, the act complained of is a present existing continuing nuisance, the appeal is not liable to be dismissed.—*By Potts, J.*



The granting or refusal of the temporary injunction during the pendency of the cause, was a matter of discretion with the Chancellor. It concluded no right of the parties, or of either of them. The order is in no sense a final order—costs are not adjudged. It is not an order from which an appeal will properly lie.— *By Green, C. J.*

The bill in this case sets out that the president and council of the city of Paterson had purchased a farm in Saddle River, and were engaged in erecting on it a poor house, or poor and work house, in which they intended to keep the paupers chargeable, and that should become chargeable, upon that city, and the idle and dissolute persons and vagrants of the same; and that they had removed, and were keeping paupers there; and that the sending, keeping, and maintaining, &c., would be a great injury and nuisance and a public wrong to the inhabitants of said township and county, and praying relief and an injunction.

The bill was directed to be filed, and time given to the defendants to put in an answer.

The answer admits the purchase of the land, and that they were erecting a building upon it to be used as a poor house, &c., but denying that it would be an injury, nuisance, or public wrong, and claiming right under their charter to erect and maintain such poor house, &c.

Asa Whitehead for complainants.

Wm. Gledhill for defendants.

THE CHANCELLOR. I do not feel myself at liberty to grant a preliminary injunction in this case. There are important principles of law, as well as important facts, involved in the issue. The object of a preliminary injunction is to prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case. The defendants have purchased the farm and removed the paupers, and have nearly completed an expensive building on the premises. To interrupt the progress of the defendants in completing their

building, can be of no advantage to the complainants; such interference might greatly injure the defendants, in a pecuniary point of view, by interfering with their contract for buildings, and in other respects. It is not the building which the complainants regard as a nuisance, but the use to which it is to be applied. To compel the defendants to provide some other place for the accommodation of the paupers during the pendency of this suit, and until their rights are finally determined, would, necessarily, expose them to great inconvenience and expense.' On the contrary, if matters are permitted to remain as they are, until final hearing, it can be, at the worst, but an inconvenience to the complainants, temporary in its character. The delay of the complainants, in not making an earlier application to the court, has placed the defendants in a situation in which they should not be disturbed until their rights, which the complainants' question, are finally determined. There is another reason why I do not feel myself at liberty to interfere now. It is admitted by the parties that the questions involved in this controversy are now before a court of law. The defendants have been indicted in the county of Bergen for erecting and maintaining the nuisance, which it is the object of this suit to remove. The questions of law and of fact are before the proper and appropriate tribunals. It is true the defendants do not interpose any objection to the jurisdiction of this court, on the ground of the pendency of this indictment. Nevertheless, the proceedings at law may be noticed by the court for its own satisfaction. If a pure question of law was involved —for instance, whether the defendants have any right under their charter to purchase and hold the farm without the territorial limits of their city—this court would not settle that question. It would have no right to settle it. It would be a proper question to be determined by a *quo warranto*, or in some other legal way. (*Attorney General v. Utica Ins. Co.*, 2 *J. C. R.*, 371.) It is the special grievance to the complainants that justifies the interference of this court. (*Caning and others v. Lowerre*, 6 *J. C. R.*, 439.) But as to the questions, both of law, and of fact, the court may ask, or may



wait for, the action of another tribunal. If there is difficulty as to the law involved, the court may hold the case, and send the party to a court of law to determine the legal controversy; or, if the facts are complicated and difficult, an issue may be awarded to try them. In this case there are many nice and important questions of law, as well as the one of fact: whether a nuisance or not? There appears to me, therefore, a propriety in this court's waiting for the decision of the case at law. Should it be determined that the defendants have a right to establish a "poor house" without their territorial limits, that terminates this controversy—for the complaint is not to the manner, but as to the right of the defendants carrying out their projects.

The injunction is refused, but without costs. The complainants may wait, and renew their application for injunction after the indictment is tried, or may proceed with this case to final hearing.

GREEN, C. J. The bill asks an injunction to restrain the city of Paterson from erecting a building for a poor house, and from keeping their paupers and vagrants in any building upon a farm owned by the city in the township of Saddle River, in the county of Bergen. The complainants, upon filing the bill, asked a temporary injunction. Time was allowed to the defendants to file an answer. Upon the coming in of the answer, the temporary injunction was denied, without costs. From that order, the complainants have appealed.

Several important questions of law and fact are involved in the controversy, and have been ably discussed upon the argument, viz: Whether a city or town may establish a poor house without its own territorial limits? Whether a poor house, established in a populous neighborhood, be in itself a nuisance? Whether this particular poor house is so conducted as to be a nuisance?

The Chancellor decides neither of these questions. He simply declines to interfere by a temporary injunction. He intimates, indeed, that the questions of law and of fact should be settled in a court of law, before the allowance of an in-

junction. But his decision is simply that he will not grant a temporary injunction before the final hearing of the cause.

The granting or refusal of the temporary injunction, during the pendency of the cause, was a matter of discretion with the Chancellor. It concluded no right of the parties, or of either of them. The order is in no sense a final order. Costs are not adjudged. It is not an order from which an appeal will properly lie. *Garr v. Hill*, 1 *Halst. Chan. R.*, 639; *Trustees of Huntington v. Nicoll*, 3 *John. R.*, 566.

Clearly, no irremediable injury can result from a denial of the injunction, nor can the subject matter in controversy be withdrawn from the jurisdiction of the court.

No opinion whatever is designed to be expressed or intimated, upon the merits of the case. The Chancellor has expressed none. He has simply declined, in the exercise of his discretion, to use the restraining power of the court, before the cause is heard upon the merits. In doing so, it is not perceived that he exercised his discretion unwisely or injudiciously. If the case were otherwise, it is not a proper case for the interference of this court. We may not in such a case substitute our opinion for the discretion of the Chancellor, without needlessly and wrongfully trenching upon the rights and powers of that court.

The appeal should be dismissed.

Order accordingly.

POTTS, J. The bill in this case sets out that the president and council of the city of Paterson had purchased a farm in Saddle River, and were engaged in erecting on it a poor house, or poor and work house, in which they intended to keep the paupers chargeable, and that should become chargeable, upon that city, and the idle and dissolute persons and vagrants of the same, and to put them to work and labor there, and confine them for punishment as vagrants, and to pass by-laws and rules for the regulation and government of said institution; and that they had removed and were keeping paupers, &c., there; that they claim an exemption of the said land and establishment from taxation, and that the



sending, keeping, and maintaining paupers, &c. there, will be a great injury and nuisance, and a public wrong to the inhabitants of said township of Saddle River, and said county of Bergen, &c., and praying relief and an injunction, &c.

The bill was directed to be filed, and time given to the defendants to put in an answer; and an answer and affidavits were subsequently filed, admitting the purchase of the land, and that they were erecting a building on it to be used as a poor house, &c., but denying that it would be an injury, nuisance, or public wrong, and claiming right under their charter to erect and maintain such poor house, &c.

The Chancellor, on argument, made an order refusing a preliminary injunction, whereupon this appeal was taken to this court from said order.

Whether the city of Paterson has a legal right, under the provisions of her charter, to buy lands, and erect, maintain, and govern a poor house thereon out of her territorial limits and within the bounds of another township and county; and whether the erection and maintenance of such an institution, at such place, and under such circumstances, is a public wrong, injury, and nuisance which the court of chancery has power to prevent, are questions which have been ably and elaborately argued on both sides before the court.

But it is very clear that this court cannot, in this collateral way, undertake to decide the whole merits of this case, as presented in the bill, answer, and affidavits. The court of chancery has not done so. The cause was not before that court upon final hearing. The testimony was not taken; the cause was not ready for hearing. The motion argued before the Chancellor was a motion for a preliminary injunction pending the suit. That motion alone was decided; and the only question with which we have now to deal, is whether the order refusing a prelimary injunction was *erroneous;* for, to warrant a reversal upon appeal from chancery, some definite rule of law or equity must appear to have been violated. *Garr v. Hill*, 1 *Hal. Ch. R.*, 639; *Rogers v. Hosack's ex'rs*, 18 *Wendell*, 329.

Indeed, so narrow is the question that usually comes up by

appeals from interlocutory orders of the court of chancery, so exclusively is the appellate court confined to the simple merits of the order itself, that repeated efforts have been made to define with precision the exact line between orders that are appealable, and orders that are not appealable. This is no easy task, nor has it been entirely accomplished. The statute (*Rev. S.* 921, § 80) says that all persons *aggrieved* by any order, &c., may appeal. But this language must have a legal construction; and hence this court held, in the first case above cited, that the party must, in a *legal sense*, be aggrieved. The order must be one which touches the merits of the question in the cause, and affects the rights or interests of the party. And so it has been held that orders relating merely to questions of *practice*, as an order for the examination of a witness, saving all just exceptions, is not appealable, *Huntington v. Nichol*, 3 *John. R.*, 566; or for an attachment to answer touching an alleged contempt, *Bruce v. Street*, 9 *John's R.*, 442; nor does an appeal lie from a decree made upon a default at the hearing, *Sands v. Hildreth*, 12 *John's R.*, 493. In *Bruce v. Street*, Chancellor Kent, delivering the unanimous opinion of the court of errors of New York, said: "It has been frequently admitted in this court, that there is a class of orders in chancery which are not objects of appeal. But there never has been any precise and definite line drawn between that class of orders which are, and that class which are not, the ground of appeal. Every person of sense and reflection will at once perceive that such a distinction does, and must exist. Orders of one kind or other arise upon every material step taken in the progress of a suit in chancery; and they become very frequent and numerous in a cause that is much litigated. Many of these orders relate to the process and practice of the court, and to allow an appeal from every order would not only be absurd but intolerably oppressive." It never was contemplated, he says, to allow an appeal from any decree or order which did not involve a *decision* upon some matter touching the *merits* of the controversy. And so



it has also been held that an appeal does not lie upon a question as to interlocutory *costs* merely, or from a decree for *costs*, which rests in the discretion of the court. *Winslow v. Collins*, 3 *Paige* 88; *Hunt v. Wallace*, 6 *Paige* 371; *Travis v. Waters*, 12 *John's R.* 500; *Rogers v. Hally*, 18 *Wendell* 350.

Of course this rule does not apply in a case where the allowance or refusal of costs is governed by statute or a standing rule of court, or is a matter of strict right. *Buloid v. Miller*, 4 *Paige*, 473.

It is, perhaps, impossible to run the discriminating line through the whole class of interlocutory orders, so as to establish a permanent and inflexible rule, but by applying to each case the principles referred to as settled, an approximation may be made to it.

As to the question whether orders granting, refusing, continuing, and dissolving injunctions, are properly within the class of appealable orders, Mr. Justice Bronson, in the case of *Rowley v. Benthuysen*, 16 *Wendell*, 373, said, "I cannot admit that this power of injunction is, in all cases, a discretionary power, unless it can be maintained that the whole jurisdiction of the court of chancery is of that character. The means of administering preventive justice by the writ of injunction constitute a large and most valuable part of the power of the court. Bills are often filed for no other purpose than that of obtaining the benefit of this writ; and in other cases the granting or refusing it may be equivalent in its consequences to a direct decision upon the whole merits of the litigation. Indeed, the motion to grant or dissolve an injunction, except in cases of culpable default, is always made upon the merits of the cause, as they are disclosed in the pleadings between the parties. The question certainly is not addressed to the arbitrary or unlimited discretion of the chancellor, but depends in general upon settled and well defined principles—principles which have been established by a long course of adjudication in courts of equity—and the chancellor in awarding or dis-

solving an injunction is no more at liberty to depart from approved precedents, than is the judge who presides on the final decision in a court of law."

But admitting these general principles to be correct, it does not follow that every order granting, refusing, continuing, or dissolving an injunction is appealable. For the rule applies to this as well as to any other class of orders, that to constitute a ground of appeal the party appellant must, in a legal sense, be aggrieved by the order—it must be an order which touches the merits of the question in the cause, and effects the rights or interests of the party. In cases within this rule, this court has, I believe, uniformly entertained these appeals, and either affirmed or reversed the order appealed from; and where the order brought up has not been considered as coming within the rule, the appeals have been dismissed. *Att'y Gen'l v. Paterson and Hud. Riv. R. R. Co.*, (not reported); *Mulford v. Mirick*, (not reported); *Garr v. Hill*, (before cited). The first question then is, whether the order made, refusing a preliminary injunction in this case, is appealable? Are the appellants aggrieved in a legal sense by it? Does it touch the merits of the question in the cause? Are the rights and interests of the appellants affected by it? An injunction is the primary object of the bill. If the complainants are entitled to any relief, they are entitled to this. If, upon the case made, the erection and maintainance of this poor house is a wrong done to them, this is the redress to which they are entitled—the remedy for the wrong. The mischief must be restrained, and this is the means of restraining it with which the court of chancery is armed. It is not merely the building of a house in Saddle River that is complained of, but the keeping of paupers there—and this, if a nuisance at all, is a present, existing, continuing nuisance. The refusal of a preliminary injunction, then, does touch the merits of the cause; it is the refusal of a present relief against a present mischief; and the appeal is not liable to be dismissed.

Then, the remaining question is, whether the order of the



chancellor refusing a preliminary injunction was erroneous. And here we must recur again to the narrow limits of the question presented by this appeal. It is not whether the complainants are right or wrong upon the questions involved in the case made upon bill and answer—not whether Paterson has a right to establish and maintain her poor house in Saddle River—nor whether it is a nuisance—but whether the chancellor, in the decision he has made refusing this order, has violated any well settled and established rule of equity.

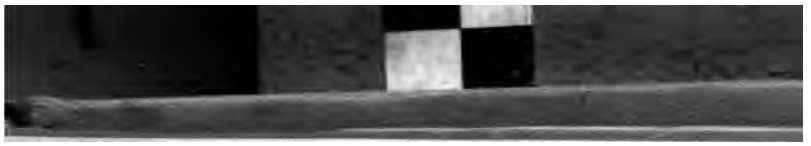
I think it very clear that he has not.

First—Because, upon the case before him in the bill, answer, and affidavits, no case of *threatening, irreparable mischief* is made out. That was the only question he had to decide upon the motion for a preliminary injunction—in advance of the hearing of the cause, and before the case was in a situation to be decided upon the merits. Where it does not appear that irreparable mischief is liable to ensue from leaving a party to go on exercising a right he claims, the court never stops him before it has an opportunity of examining the question of right. To do so would be unnecessarily to prejudge the case before a full hearing on its merits—and so are the authorities. 2 *Story's Eq. Jur., sec.* 924; *Earl of Ripon v. Hobart,* 3 *Milne & Keene,* 169; *Kane v. Vanderburgh,* 1 *John. Ch. R.,* 12; *Jerome v. Ross,* 7 *John. Ch. R.,* 315, 336; *Columbia Steamboat Co. v. Wildrin, Hal. Dig.,* 532, *s.* 2; *Quackenbush v. Van Riper,* 2 *Green's Ch. R.,* 350; *West v. Walker,* 2 *Green's Ch. R.,* 279; *Van Winkle v. Curtis,* 2 *Green's Ch. R.,* 422; *Morris Canal & Bank'g Co. v. Socy for est., U. M.,* 1 *Hal. Ch. R.,* 203. The mere *erection* of a house *intended* as a poor or poor and work house is, in itself, no injury to anybody, if the intention be never carried out. Nor is the sending of paupers into a township or county illegally, or keeping them there a few months, a case of irreparable mischief.

Second—In the second place it appeared in this case, before the court of chancery, that the questions involved were, at the time the preliminary injunction was applied

for, pending before a court of law. The main question in the cause is essentially a question of law. And the rule has been long established, that in such cases a court of equity does not interfere by injunction until the question of right is determined. *Att'y Gen'l v. Nichols*, 16 *Ves.*, 338; *Att'y Gen'l v. Clever*, 18 *Ves.*, 211; *Att'y Gen'l v. N. J. R. R. Co.*, 2 *Green's Ch. R.*, 140. Upon both these grounds the order refusing the injunction was right, and the order of the chancellor should be affirmed.

Decree of Chancellor affirmed unanimously.



Between the MORRIS AND ESSEX RAILROAD COMPANY, appellants, and JOHN I. BLAIR and others, respondants.

Where charges of fraud are clearly made in the bill, and clearly and unequivocally denied in the answer, the answer must be taken as true, unless there is something in the circumstances of the case which shows that it is not and cannot be true.

Two railroad companies were incorporated to complete two independent lines across the state. No route was prescribed to either other than the termini. There was no conflict of routes on the face of the charters, and no necessary conflict in carrying out the objects of the charters.

Held, that the prior right attached to the company which first actually surveyed and adopted a route and filed their survey in the office of the Secretary of State.

That as no specific route was granted to either company, a right to no particular place accrued to either, until they had selected or determined upon a location.

That no importance should be attached to the fact that the charter of one company was passed seven days before that of the other.

The mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

By adopting and filing a survey of their route, a company acquires a right to obtain the lands over which it passed; and they cannot be deprived of that right by another company purchasing and taking deeds for those lands, even if made without notice.

Such conveyances could at most put the purchasers in the condition of land owners, liable to have their lands taken upon making compensation.

It would not be in accordance with the practice of a court of equity, upon a mere injunction bill, to investigate and decide the legal title of two railroad companies, under their respective charters, to a conflicting route.

The injunction was issued in this cause upon the filing of the complainant's bill by one of the masters, without notice to the defendants. Upon the coming in of the answer, an order was made dissolving the injunction. From that order the complainants appealed.

The grounds upon which the order dissolving the injunction was made, and a full statement of the case, is contained

in the opinion of Abraham Browning, Esq., one of the masters of this court, to whom the matter had been referred.

Whitehead and *Whelpley* for complainants.

Frelinghuysen and *Bradley* for defendants.

THE MASTER. The bill in this case was filed on the 28th day of July, 1853. It sets forth that the complainants were incorporated on the 29th day of January, 1835, and by their charter authorized to construct a railroad from the track of the New Jersey railroad, either at Newark or at Elizabethtown, to the village of Morristown. That they were duly organized as a company on the 14th day of September, 1835; and that under their charter, and a supplement passed March 2d, 1836, they constructed their road from Newark to Morristown, at a cost of two hundred and fifty-three thousand dollars. That the supplement authorized them to extend their road from Morristown to Dover; and that under it and a further supplement, passed February 25th, 1846, they, in that year, determined upon a road to Dover; and subsequently extended their road to that town, at an additional cost of two hundred and eighty thousand dollars. That this extension was made for the purpose, and with the intention of ultimately continuing their road to the Delaware river; and, that having determined that the time had arrived for carrying this intention into effect, they applied for, and on the 19th of February, 1851, obtained, a further supplement, authorizing them to extend their road from Dover, "to any point on the Delaware, at or near the town of Belvidere, or the Water Gap, or between those places," and with power, by the consent of Pennsylvania, to construct a bridge across the river.

That under this last supplement, about the 18th day of November, 1851, they determined to extend their road to Hackettstown, which is about half way to the Water Gap with a view of ultimately extending it thereto. That on the 16th of December, 1851, they resolved to increase their cap-



ital stock five hundred thousand dollars, for the purpose of constructing the extension to Hackettstown; and that on the 20th of February, 1852, they filed in the secretary of state's office a survey of their route to that place. That four hundred thousand dollars of the said increase of capital was subscribed for, a portion of which had been paid in, and eighty thousand dollars thereof had been expended on the Hackettstown extension, which was then being vigorously prosecuted and almost completed. That before obtaining their last supplement, they had become satisfied that the public convenience and their own interest required their road should be extended to the Water Gap, in consequence of which they had ordered an actual survey to be made, which was begun in February, 1850, and subsequently prosecuted with great labor and expense. That in November, 1851, they determined upon a general route through the Vanness Gap of the intervening mountains to the Water Gap; and that afterwards they made a particular survey through said Gap, which their board of directors considered, approved, and adopted, and on the 8th day of March, 1853, they deposited it in the office of the secretary of state, at Trenton. That this survey was made in good faith, and with a determination to construct the road as soon as the right of way could be obtained. That on the 12th of March they commenced purchasing the right of way of the land owners; that on the 15th they purchased of one George Vass a portion of the route for one thousand dollars, and took his deed therefor in fee simple; that on the 17th they purchased another portion of one Lanning for one hundred and forty dollars, and took his deed; that on the 2d day of April they purchased another portion of one Taylor for six hundred dollars, and took his deed; and that they had expended in all twelve thousand dollars in purchasing the right of way along said route, and hoped to have the undisturbed possession thereof, to which, under and by virtue of the premises, they insist they are entitled.

The bill then sets forth, substantially, that one John I. Blair, and the other defendants associated with him, pre-

tending to act as a corporation, by the name of "The Warren Railroad Company," and under a pretended organization of that company, according to an act passed February 12th, 1851, entitled "An act to incorporate the Warren Railroad Company," have taken fraudulent possession of the said lands purchased of Vass, Taylor, and Lanning, and claim a right to have and hold the same, and to exclude and deprive the complainants of their said route and lands; and that said Blair and his associates have actually commenced making fraudulent excavations upon said lands, under pretence of constructing a railroad thereon, but in truth for the purpose of fraudulently frustrating the complainants in the extension of their road. That Blair and his associates pretend that "The Warren Railroad Company" had been duly organized on the 4th day of March, 1853, the stock subscribed for, the president, directors, and other officers appointed and elected; that upon the same day, after being thus organized, they duly adopted the survey of a route for a railroad through the said Vanness Gap, and over the said lands of Vass, Taylor, and Lanning, which they filed in the office of the secretary of state on the eighth day of the said month of March; and that their survey was made, adopted, and filed before the survey of the complainants. That Blair and his associates also pretend that Taylor, Vass, and Lanning executed licenses or conveyances for their lands to the Warren Railroad Company before the aforesaid purchases of them by the complainants. The bill charges that all their pretences are untrue; that the organization of the Warren Company was a mere sham; that their survey was never actually made, but was an imaginary survey on paper, indefinite, uncertain, and gotten up and adopted for the fraudulent purpose of getting possession of parts of the said route of the complainants, and thereby thwarting their operations; that their said survey was never duly adopted by the Warren Company; that their purchases of the right of way of Vass, Taylor, and Lanning, were illegal and fraudulent; in short, that the whole proceedings of the Warren Company were illegal and in bad faith, without any *bona fide* intention of constructing a road,



but simply for the purpose of interfering with and stopping the operations of the complainants; as to whom, all their acts were fraudulent and void, and ought in equity to be set aside.

The bill prays that it may be decreed—

First. That the complainants' survey is valid, and sufficient to vest in them a right to acquire the lands on the route surveyed by them.

Second. That the conveyances by Taylor, Vass, and Lanning to the complainants, are valid, and sufficient to vest in them legal title to the lands.

Third. That the survey of the Warren Company is fraudulent, and void against the complainants.

Fourth. That the complainants' survey was first filed, and was the first valid acceptance of a grant from the state of the right of way over said route; and

Fifth. That the grants of Vass, Taylor, and Lanning to the Warren Company were illegal, fraudulent, and void against the complainants.

It also prays for an injunction to restrain the defendants and all persons acting under them from all further proceedings; and for a subpœna for the defendants, including the Warren Company, by its corporate name.

Upon filing the bill, an injunction was allowed and issued according to its prayer, which was subsequently modified, so as to restrain both parties from proceeding.

An answer to this bill was filed on the 15th of October last, by all of the defendants but two, George Vass and George W. Taylor, who, it is alleged in the answer, had parted with all their interest in the Warren Railroad Company, and resigned their offices as directors, before the bill was filed. This fact also appears in the affidavits of William E. Dodge and John I. Johnson, annexed to the answer, to whom Taylor and Vass had sold their stock, and who had been elected directors in their stead.

The answer admits the complainants' charter and supplements, and their organization, as set forth in the bill, and

the construction of their railroad from Newark to Morristown, from thence to Dover, and that they were then engaged in extending it from Dover to Hackettstown, but at what cost and with what ulterior design, the defendants say they are ignorant. It also admits that the complainants made some general explorations or surveys of routes between Hackettstown and the Delaware river, but it denies that they actually surveyed and adopted any specific route, until after the Warren Company had surveyed and adopted the route in question. It also admits that the complainants surveyed a route from Hackettstown to the Water Gap, through the Vanness Gap, and over the lands of Vass, Taylor, and Lanning; but it denies that that survey was either made or filed before the survey of the Warren Company through the same Gap and over the same lands. It also admits that the complainants purchased and received deeds for the lands of Vass, Taylor, and Lanning, but it avers that such purchases and conveyances were after the same lands had been purchased by and conveyed to the Warren Company, and with full knowledge of such prior purchases. It also admits that the Warren Company had taken possession of the lands purchased of Vass, Taylor, and Lanning, and made excavations for the purpose of making a railroad thereon, but avers that such possession and excavations were in good faith, and for the *bona fide* purpose of constructing a road, denying the fraud charged in the bill.

In justification of the acts of the defendants, the answer sets up the charter of "The Warren Railroad Company," by the legislature of New Jersey, granting them the right "to survey, lay out, and construct a railroad from some suitable place on the Delaware river, not more than five miles above the Delaware Water Gap, by the most feasible route, to intersect the road of the Central Railroad Company of New Jersey, at or near New Hampton," approved on the 12th day of February, 1851, seven days before the supplement authorizing complainants to extend their road from Hackettstown to the Delaware river.

The organization of the Warren Company on the 4th of



March, 1853, by subscriptions to the capital stock; the election of Blair and the other individual defendants, directors; the organization of the board of directors, and the election of Blair as president, setting out with great particularity the whole proceeding, which organization it avers to have been in good faith, according to their charter, and for the purpose of carrying its object into effect, denying that it was a sham for the fraudulent purpose of thwarting the complainants, or for any other fraudulent or improper purpose. The answer then avers, that previous to this organization, a survey of the route from New Hampton to the Water Gap had been made, under the direction of Mr. Blair, and that that survey was, on the same 4th day of March, adopted by the board of directors of the Warren Company; and that Mr. Blair was then directed to have the said survey filed in the office of the secretary of state; and that he had it filed on the 8th day of March, before the complainants' survey was filed; that having adopted and filed their survey, Blair, under authority of the Warren Company, purchased and procured conveyances of Vass, Taylor, and Lanning, upon the line of the route, before the complainants purchased of them, of which the complainants had notice; and that the Warren Company then entered upon these lands and commenced the construction of their road in good faith, which they intended to complete, and continued their work until restrained by the injunction. The answer admits that the two routes adopted by the companies conflict in the Vass and Vanness Gaps, but insists that these conflicts, by slight alterations on the part of complainants, could be avoided without any very considerable expense, but that if both roads cannot be made through the passes in the mountains where they conflict, the complainants must yield.

These are, substantially, the averments of the bill and answer, so far as necessary to understand the points in controversy; and if the complainants have a right to the continuance of the injunction, it must be on one of two grounds:

First—Fraud in the organization and proceedings of the Warren Company; or,

Second—A prior, legal or equitable right in the complainants, to the lands where the routes conflict.

I. The fraud charged is, that knowing the intentions of the complainants to extend their road from Hackettstown to the Water Gap, Blair and his associates made a mere fictitious organization of the Warren Company, adopted a paper survey of a route never actually run through the passes in the mountains where the complainants road would pass, and then made purchases of the lands in those passes merely for the purpose of thwarting the complainants without any *bona fide* intention of constructing a road there themselves.

These charges are clearly and unequivocally made in the bill, and without entering into any critical examination, I think they are as clearly and unequivocally denied in the answer. In this respect, the answer is responsive to the bill, and must therefore be taken as true, unless there is something in the circumstances of the case which shows that it is not and cannot be true: I am unable to discover any such circumstances; on the contrary, the business and business relations of Mr. Blair, (who was undoubtedly the leading man in the organization of the Warren Company,) detailed in the answer, his interests in the manufacture of iron in the state of Pennsylvania, his connection with the railroads in that state, then made and being made, and with which and the Central Railroad in this state, the Warren road would apparently make a very important link, completing a communication by railroad between his iron works and the city of New York, and the obvious interest which he and those connected in business with him had in forming such a communication, tend, in my view, greatly to confirm the answer.

It may be true, and I have no doubt is true, that Blair and his associates hastened the organization of the Warren Company, and adoption and filing of a survey through the important passes of the mountains, and the purchasing of

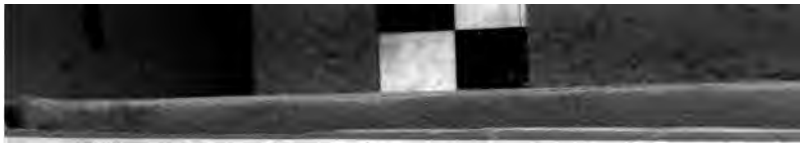


the lands in those passes, in consequence of discovering that the complainants were about to locate, or would probably locate, the extension of their road there; but in this I see nothing fraudulent or illegal. They had a charter authorizing them to construct a road "by the most feasible route," from New Hampton to the Delaware, so as to perfect an important line of communication in which they were deeply interested; and if they discovered that this "most feasible route" was about to be occupied by the complainants, there was nothing illegal or fraudulent in hastening their organization and adoption of a survey, so as to secure the route to themselves. It is of no importance whether this was all done in one day or one month, provided there was a legal right to do it; nor is it any ground of objection with the complainants, that there was irregularity in the organization of the Warren Company, provided an organization was actually made; they thereby became a corporation *de facto*, and their right to act as a corporation cannot be questioned by the complainants in this collateral way; and in my view, it is of as little importance whether the survey of the route was before or after the organization, or by whom, or under whose direction it was made. The adoption of it by the Warren Company made it their own, as much so as if made after the organization, by a person employed by them for that purpose. These matters only become important in connection with the question of fraud, whether the proceedings of the defendants were in good or bad faith; the charges of fraud being fully met by the answer, the haste and irregularity of the proceedings become unimportant. This brings me to the second ground upon which the complainants rest their argument to have the injunction continued.

II. The prior, legal and equitable right to the conflicting portions of the routes of the two companies is a question of law, arising out of the charters of the companies, and their respective proceedings under them.

In the first place it should be observed, in reference to the roads of the two companies, as authorized by their

charters, that they start from entirely different points, some fifteen miles distant; the one from the then terminus of the Morris and Essex road, at Dover, in the county of Morris; the other from the line of the Central road, at New Hampton, in the county of Warren. Neither has a specific terminus assigned. The complainants are authorized to go to the Delaware river, anywhere between Belvidere and the Water Gap, a distance of fifteen miles; the Warren Company may go to the river anywhere below a point five miles above the Water Gap. One road is designed to connect the Morris and Essex road with the river; the other to form a connection between the Central Railroad and the river. They are to complete two independent railroad lines across the state, and there is no route granted or prescribed to either, other than their commencements and indefinite termini above described; nothing therefore appears upon the face of their charters creating a necessary conflict of routes; each company is at liberty to select its own route and its own termination upon the river, within the prescribed limits. It is not a case therefore of a prior grant of a specific route for a railroad by the legislature to one company, and a subsequent grant of the same route to another company, without repealing the former grant, or providing for compensation. If it were, upon principle and authority, the first company would take a vested right in the route, to the exclusion of the second. *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R. R. Co.*, 4 *Gill and Johns*, 1. There is no conflict on the face of the charters, and no necessary conflict in carrying out the objects of the charters. The conflict is one, not of necessity, but of choice in the selection of routes by the companies; and in my opinion, therefore, the prior right will attach to the company which first actually surveyed and adopted a route and filed their survey in the office of the secretary of state. The language of the charter of the Warren Company is, "when the route of such road shall have been determined upon, and a survey of such route deposited in the office of the secretary of state, then it shall be lawful for said company to enter upon" and



construct their road. (*Sec.* 6.) The complainants' charter is substantially the same. (*Sec.* 6.) As no specific route was granted to either company, a right to no particular place could accrue to either, until they had selected or determined upon a location; consequently I attach no importance to the fact that the charter of the Warren Company was passed seven days before the charter authorizing the extension of the complainants' road. At least I do not base my opinion on that fact; if entitled to any weight, it is in favor of the Warren Company, whose charter gives them a right to the "most feasible route."

It may be true that the complainants first actually surveyed in the passes where the conflicts occur, although there seems to be some doubt on this subject. But, assuming it to be true, the mere experimental surveying of a route will not confer any vested or legal right, until it shall have been adopted. Until then the company is in no wise committed to it. If done by their direction, they may change their mind and go elsewhere. It may be the mere act of their engineer; and he may recommend it or not. If he should, the company may reject it and select another route. Although the complainants therefore may have first surveyed the conflicting passes in the mountains, yet the Warren Company afterwards surveyed the same passes, and first adopted the route, and first filed their survey in the office of the secretary of state. This gave them a legal right to the route surveyed, and in my view excluded the complainants from occupying the same lands.

The bill charges, that at the time of the adoption of the survey by the Warren Company, on the morning of the fourth of March, they had no survey before them, that is, no map or formal written description of the exact route which the engineer had run. The answer substantially admits this. But the survey had then been actually made; and either from Mr. Blair, or in some other way, the directors knew where it had been run; and by resolution they adopted and approved of the line of location, as surveyed and made by Edwin McNeil, chief engineer, and under

his direction, "as now staked out," describing generally the route. By another resolution, they directed their president, Mr. Blair, to have the survey thus adopted mapped and filed. This was subsequently done; so that a written survey was filed on the morning of the eighth, before the complainants had filed their survey, which was both adopted and filed on that day. I do not think it was essential that the Warren Company should have had a map or a formal written survey before them; or that such a map or survey should have been made at the time of the passage of the resolution adopting the survey made by McNeil. It is sufficient if the survey had been made on the ground. The adoption was of a survey thus made, that is, of the route or location; of which a map or writing would be mere evidence, and could be furnished afterwards from the field notes of the engineer.

In this connection may be mentioned another objection urged against the survey of the Warren Company, that it is uncertain and indefinite, being described by radii and curves, instead of a succession of angles of course and distance. Perhaps the former of these modes, if carefully done, is more accurate than the latter. Either would enable an engineer to run the survey on the ground, and either mode is therefore sufficient. But upon inspection of the Warren survey, in several instances it is not stated whether the curve is to the right or left, so that at those points some difficulty might arise. These, however, are not the points where the routes conflict, and can no more be objected to by the complainants, than the Warren Company could object to their survey, because in transcribing, in some instances, west had been written for east, or north for south. I think the survey, as adopted, was sufficient.

The Warren Company, by adopting and filing a survey of their route, acquired a right to obtain the lands over which it passed. They could not be deprived of that right by the complainants purchasing and taking deeds for those lands, even if made without notice, and before the purchases by the Warren Company. Such conveyances could at most put



the complainants in the condition of land owners, liable to have their lands taken by the Warren Company upon making compensation. But in fact, the Warren Company first purchased and obtained deeds from Vass, Taylor, and Lanning, for the lands in the conflicting passes. Afterwards, the complainants, with a full knowledge of the prior purchases, purchased the same lands. This could confer no right, legal or equitable, against the Warren Company.

It was strongly pressed upon the hearing, that the complainants, by first making their road to Morristown, and extending it to Dover and Hackettstown, under the respective supplements to their charter, with a determination upon their part ultimately to obtain permission and extend their road to the Delaware river, acquired an equitable right to do so, against the Warren Company, which was not incorporated until after the Dover extension had been authorized and constructed; and after this determination had been conceived by the complainants.

The charter of the complainants and its supplements, which had been passed before the incorporation of the Warren Company, only authorized them to construct a road as far as Dover; and whatever may have been the designs, intentions and determinations of the complainants as to what they would ultimately prevail upon the legislature to permit them to do, and what they would ultimately accomplish, they surely could acquire no right, legal or equitable, to extend their road to the river, until they had obtained permission to do so. As to the construction of any road beyond the terminus fixed in their charter and its supplements, they had and could have no right. The field of enterprize beyond was open to others as well as to them; and the justice or propriety of conferring additional powers upon them, or giving them to others, was for the consideration of the legislature. The acquisition of one corporate privilege will not draw to it a separate and independent corporate privilege. Corporations have no other rights or powers than those expressly granted, or necessary to their enjoyment.

Besides, these determinations, if they really existed in the minds of the complainants, were never expressed or declared in the only way that a corporation can speak or declare its intentions, by resolutions passed or published by their board of directors. Any other determinations than these are the mere opinions or resolves existing in the minds of the individual members. They may or may not be the same in all, or a majority of the members. The corporation, as such, is not responsible for nor can it predicate any rights upon them, until assumed by their board of directors.

The charges of fraud contained in the bill having been fully met by the answer; and the legal and equitable right to the conflicting portions of the routes being, in my opinion, in the Warren Company, I think the injunction should be dissolved; and I do therefore recommend to his Honor, the Chancellor, to dissolve the same with costs.

The opinion of the court of appeals was delivered by

GREEN, C. J. The injunction was issued in this cause upon the filing of the complainants' bill by one of the masters, without notice to the defendants. Upon the coming in of the answer, an order was made dissolving the injunction. From that order the complainants have appealed.

It is conceded by counsel, that the simple inquiry for this court is whether the equity of the bill is fully met and denied by the answer? If it is, then, by the well settled rules of the court of equity the injunction was properly dissolved, and the order of the chancellor must be affirmed.

The gravamen of the complainants' bill consists mainly in the charge of fraud in the organization of the Warren Railroad Company, and in the preparation and filing of the survey of their route. The Warren Railroad Company, it is alleged, was organized, and the survey of their route made and filed, without the means or intention of constructing a road, but *mala fide* for the purpose of anticipating and thwarting the operations of the defendants.



This charge is fully met and expressly denied by the defendants' answer. It is clearly set forth in the answer, in terms that admit of no equivocation, that the organization of the Warren Railroad Company was completed, their survey made and filed, and the work entered upon in good faith for the purpose of constructing their road under the authority of their charter, upon the route thereby authorized. That the organization of the Warren road was irregularly or informally made, that it was made in great haste, for the express purpose of gaining a priority over the complainants, are immaterial charges, except so far as they tend to support the charge of fraud. The existence of the Warren Railroad Company *de facto*, cannot, it is admitted, be denied or called in question upon this investigation. So far as the charges of fraud are concerned, the equity of the bill is fully denied by the answer.

Independent of the charge of fraud, the complainants show no prior legal or equitable title over the defendants which entitle them to the aid of a court of equity. It would not be in accordance with the practice of a court of equity, upon a mere injunction bill, to investigate and decide the legal title of these parties, under their respective charters, to the route in question.

Upon the grounds clearly expressed in the opinion of the master, in compliance with which the order dissolving the injunction was made, the order should be affirmed, with costs.

Decree accordingly.

Decree affirmed unanimously.

COURT OF ERRORS AND APPEALS.

NOVEMBER TERM, 1854.

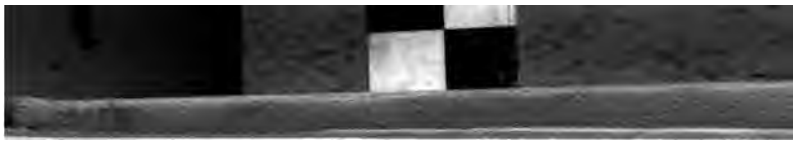
JOHN CORYELL EX. *et al.*, appellants; and CAROLINE HOLCOMBE, by her GUARDIAN, respondent.

There can be no appeal from an order of the court of chancery directing process to bring in the parties to answer for an alleged contempt. It cannot be said that the party *is aggrieved* by such an order.

Where the order has been executed, the object attained, and there is nothing upon which a judgment of reversal could operate, the appeal will be dismissed.

This was an appeal from an order of the chancellor directing process to bring in the parties to answer for an alleged contempt. The opinion of the court, dismissing the appeal, was delivered by

THE CHANCELLOR. The bill exhibited in this cause in the court of chancery was on behalf of an infant complainant. The object of the bill was to obtain an account from the defendants of an estate in their hands, as the executors of the will of the father of the infant, and also for proper allowances out of the estate for her maintainance and education. After the answer of the defendant came in, a petition was filed praying an allowance as well for the purposes of education and maintainance *pendente lite*, as also a proper allowance to enable the complainant to prosecute her suit. Upon a reference to a master and his report thereon, the chancellor, on the 20th March, 1854, made an order directing a certain sum of money to be paid to the



complainant, for the purposes named in her petition. This order was not appealed from. It still stands in full force. A copy of it was served upon the defendants, and they neglected and refused to comply with it.

On the 14th September, 1854, the chancellor made an order which, after reciting the one of the 20th March previous, and its due service according to the practice of the court—the refusal of the defendants to obey the same, and due notice of the then application—directed that an attachment issue against John Coryell and Alexander Coryell, two of the said defendants. From this order the defendants appealed to this court. The respondent now moves to dismiss the appeal on the ground that no appeal can be taken from the order—it being a mere order in the progress of the suit, not affecting the merits of the cause, and by which the party appealing is not aggrieved. The counsel for the appellants insist, that an appeal is given by the constitution, and by statute, from *every* order made by the court of chancery in the progress of a cause, and that this court has no authority to limit this right, but must hear the appeal. The broad ground taken by the counsel would lead to much more mischief, and be more oppressive to parties, than an erroneous decree, or order, which the right of appeal is intended to redress. But it is not warranted by the language, or spirit, of the constitution, or the statute. In speaking of the court of appeals, the constitution declares, (*Art.* 6, *sec.* 2, *par.* 5,) "when an appeal from an order or decree shall be heard, the chancellor shall inform the court, in writing, of the reasons for his order, or decree." This is all the constitution says upon the subject. The language, so far from justifying an argument that a party should have an appeal from any and every order the chancellor might make, in the progress of a cause, rather implies the contrary. In matters of practice merely, or of discretion, what could be the object in the chancellor's furnishing the court with his reasons in writing? The constitution contemplates that in the regulation of the court by statute, and by the rules and regulations of the respective courts, a

party aggrieved may have redress by an appeal, and this the statute has secured to such party. It enacts (*Laws of N. J.* 921, § 80), that all persons aggrieved by any order or decree of the court of chancery, may appeal from the same, or any part thereof, to the court of errors and appeals. The rules of this court and of the court of chancery afford to such party the full benefit of the statute.

Without defining the character, or attempting to classify the orders of the court of chancery, which may, and may not, be appealed from, it is certain there can be no appeal from an order by which the party is not aggrieved. The very object of the appeal is to redress an injury. If there is no injury to redress there can be no appeal. The object of the appeal cannot be attained. It cannot be what it is intended —a redress for an injury.

By a statute of New York, while the court of chancery existed there as at present in this state, an appeal was given almost in the same language as by our statute, "that all persons aggrieved by any sentence, judgment, decree, or order, of the court of chancery, or court of probate, may appeal from the same, or any part thereof." By repeated decisions of the courts of that state, it was decided, that an appeal would not lie from any interlocutory order which did not involve a decision upon some matter touching the merits of a cause, and by which the party was aggrieved. See *Newkirk v. Willet*, 2 *Johns. Ca.*, 115; *Taylor v. Delancy*, 2 *Cai. Ca.*, 142; *Trustees of Huntington v. Nicoll*, 3 *Johns.* 566; *McVickar v. Wolcott*, 4 *Johns.* 510; *Buell v. Street*, 9 *Johns.* 443; *Travis v. Waters*, 12 *Johns.* 510; *Clason v. Shotwell*, 12 *Johns.* 31; *Simpson v. Hart*, 14 *Johns.* 65; *Chapman v. Hammersley*, 4 *Wend.* 173; *McCredie v. Sendor*, 4 *Paige*, 378; *Rowley v. Van Benthuysen*, 16 *Wend.*, 369, 12 *Johns.* 31, *ed.* 249: *Brack v. Fulton Bank*, 2 *Wend.*, 225; *Tripp v. Cook*, 26 *Wend.*, 150; *Williamson v. Heyer*, 4 *Wend.*, 170; *Rogers v. Patterson*, 4 *Paige*, 450; *Gibson v. Martin*, 8 *Paige*, 481; *Rogers v. Hosack*, 18 *Wend.*, 329. These cases are all cited in *Cruger v. Douglass and others*, 8 *Barb. Sup. C. Rep.*, 81.



The order appealed from in this case is nothing more than an order directing process to bring in the parties to answer for an alleged contempt. An appeal from an order awarding process of subpœna would lie with quite as much propriety. It cannot be said that the party is aggrieved by such an order. He is not, and unless he is aggrieved he is not entitled to an appeal.

This is not an order to carry into effect, or execute, an order or decree of the court, but operates as a rule to show cause why such order should not be executed.

This whole matter is very satisfactorily investigated by Judge Potts, in the case of the *Att'y Gen'l v. The Pres't and Council of the City of Paterson*, in an opinion delivered in June term last of this court. In reviewing the positions then taken, the court do not now see any ground for dissenting from them.

But there is another ground for denying this appeal. It appears by the proceedings before us, that process was issued upon this order—that the appellants were brought before the court, entered their appearance according to the rules of the court, and actually answered interrogatories exhibited before a master. What redress then can the appellants obtain by this appeal?

One of the grounds for dismissing the appeal in *Trustees of Huntington v. Nicoll*, 3 *Johns Rep.*, 587, was that there was nothing upon which a judgment of reversal could operate. In that case there was an appeal from an order for a temporary injunction which had expired. In the decision of the case it is aptly remarked, that to pronounce a nugatory and idle judgment, which the court has not the power to enforce, is incompatible with the solemnity and dignity of judicial proceedings.

If this appeal should be maintained, and the order appealed from set aside, the appellants can derive no benefit from the judgment of this court. The object of the order has been attained. The order has been executed. There is no redress which this court can give to the appellants.

To sustain this appeal would be oppressive to all parties, and no possible benefit can be derived from it by any one.

Let the appeal be dismissed with costs,

Appeal dismissed unanimously.



COURT OF ERRORS AND APPEALS.

MARCH TERM, 1855.

Ralph V. M. Cooper, appellant, and William Morris Cooper, respondent.

Either party may set a cause down for hearing, but it is the duty of the appellant, in all cases, to prepare the state of the case. In case of neglect, the remedy is by dismissing the appeal.

It is the *right* of the appellant to prepare the state of the case, or, at his option, to abandon the further prosecution of his appeal. Nor can he be deprived of that right.

Quere—Whether the respondent, in case he, as well as the appellant, is aggrieved by the decree of the court below, and insists upon a hearing as essential to his rights, may bring the cause to a hearing against the will of the appellant.

The appellant cannot be subjected, against his will, to additional costs, by the adverse party preparing the case for him. It is clearly his right to insist upon his right of preparing the case, or of abandoning the appeal at his pleasure. But where no state of the case has been prepared by the appellant, as required by the rule, the respondent may at once move to dismiss the appeal. And if the appellant refuse to go to hearing upon a case fairly prepared by his adversary, justice would require that the appeal should be dismissed.

While the court condemn the practice of marking a case by italics, whether a state of the case shall be rejected upon this ground, rests in the sound discretion of the court.

On appeal from chancery it is not necessary to print the pleadings and evidence in full. The formal parts of the bill may always be advantageously omitted, and the pleadings in most cases materially abridged.

Halsted, for appellant.

Dudley and *Browning*, for respondent.

The opinion of the court, dismissing the appeal, was delivered by

Green, C. J. The rules of this court, as they existed un-

der the ancient organization of the court, did not clearly prescribe by whom, in all cases, the state of the case should be prepared, nor did they impose any penalty upon the party setting down the cause, for failing to prepare the case. To remedy this evil, rule twenty-third of the present rules was adopted. This rule directs that "the state of the case or abridgments of the pleadings and proofs, and of the petition of appeal, or of the record and assignment of errors, mentioned in the thirteenth rule, shall be furnished by the appellant or plaintiff in error, and on failure thereof the appeal or writ of error may be dismissed, with costs."

Either party may set a cause down for hearing, but it is the duty of the appellant, in all cases, to prepare the state of the case. In case of neglect, the remedy is by dismissing the appeal. As it is the *duty*, so likewise it is the *right*, of the appellant to prepare the state of the case, or at his option to abandon the further prosecution of his appeal. Nor can he be deprived of that right, or subjected, against his will, to additional costs, by the adverse party preparing the case for him.

Whether the respondent, in case he, as well as the appellant, is aggrieved by the decree of the court below, and insists upon a hearing as essential to his rights, may bring the cause to a hearing against the will of the appellant, it is unnecessary now to decide. That is not the case before the court.

If the appellant, in the present instance, had prepared a state of the case, as by the rule he was authorized and required to do, the court must have heard the cause upon the case so made by him. He could not have been prejudiced or subjected to additional costs, by the error of the respondent's counsel in making out another case. And it would seem, in the present stage of the cause, to be clearly the privilege of the appellant to insist upon his right of preparing the case, or of abandoning the appeal at his pleasure. But in such case, the respondent may at once move to dismiss the appeal, because no state of the case has been prepared by the appellant, as required by the rule. And if the appellant refuse to



go to hearing upon a case fairly prepared by his adversary, justice would require that the appeal should be dismissed for his laches. Under existing circumstances, therefore, the court are of opinion that it is in the option of the appellant either to submit to a dismissal of the appeal, by reason of his failure to prepare the state of the case, or to go to hearing upon the case prepared by the respondent, provided that case is fairly stated.

Various objections are made to the state of the case as prepared by the respondent.

First. It is objected that the case as originally printed and served upon the appellant's counsel, had many material parts of the pleadings and evidence printed in italics. In the cases now furnished to the court, the objectionable passages have been reprinted in roman character upon slips of paper, which are pasted over the original italics.

The court have in repeated instances condemned the practice of marking a case by italics, or of adopting any other mode of drawing the special attention of the court to such parts of the pleadings or evidence as the party may deem favorable to his interest; and, in at least one instance, the case, for this error, has been ordered to be reprinted. The practice proceeds upon the plain ground that the party preparing the case should not be permitted to gain any advantage, however trivial, over his adversary, in bringing his case to the attention of the court. But whether the state of the case shall be rejected upon this ground must rest in the sound discretion of the court.

In the present instance, it is clearly shown that the error was not designed. It was a mistake of the printer, and contrary to injunctions expressly given. The solicitor has endeavored, as far as practicable, to correct the error. On inspecting the case, we do not perceive that the objection is so serious as to require that the case should be reprinted. The case has, in fact, been so far corrected, that the objectionable passages might probably have passed unnoticed, had not the attention of the court been specially directed to them.

Second. It is objected that no attempt was made to pre-

pare an *abridgement* of the pleadings, and that the case is cumbered with much irrelevant matter, by which the court and counsel are needlessly embarrassed, and the party subjected to unnecessary costs.

So far as relates to the increase of costs, should the decree be against the appellant, his rights may be fully protected, upon the taxation of costs, and, if necessary, upon a motion for re-taxation. The court would not permit him to be subjected to unnecessary costs, especially where the state of the case was improperly prepared by the adverse party.

It is due to the respondent's counsel, by whom the case was prepared, to say that the case, as printed, appears to be in accordance with the usual practice of the court. On appeals from chancery it is usual, though certainly not necessary, to print the pleadings and evidence in full. The formal parts of the bill may always be advantageously omitted, and the pleadings in most cases materially abridged.

Third. It is objected that the case as printed and presented to the court is materially variant from that served upon the counsel of the appellant. No material variance has been pointed out. The mere change of italics to roman characters constitutes no substantial variance. If, upon examination, variances should appear which are clearly substantial and material, the further progress of the cause may be arrested.

The cause must be heard upon the case prepared by the respondent's counsel, unless the appellant elect to have the appeal dismissed.

Order accordingly.



Between SENECA SINNICKSON and WIFE, appellants, and JONATHAN BRUERE *et al.*, administrators of James Bruere, deceased, respondents.

The court will not interfere with the report of a master, upon a question of fact submitted to him, depending upon the credibility of witnesses, unless the error of the master is satisfactorily and clearly made to appear.

Jonathan Bruere and John H. Bruere, administrators of James Bruere, deceased, filed their bill of complaint in the court of chancery, on the 2d day of April, 1849, against Seneca Sinnickson and Ruth his wife, to foreclose a certain mortgage, executed by the said Seneca and wife to the said James Bruere, bearing date the 10th day of April, 1827, to secure the payment of the sum of five thousand and one hundred dollars in one year from date, according to the condition of a bond in penal sum of ten thousand two hundred dollars.

The defendants filed their answer to said bill on the 17th day of October, 1849; and on the 20th day of June, 1851, it was referred to Richard W. Howell, esquire, one of the masters of the court of chancery, "to ascertain and report the amount due on the said mortgage, for principal and interest, after deducting all payments that have been made thereon, and that the master make his report thereof to this court with all convenient speed. And all further equity and directions are reserved until the coming in of the master's report."

MASTER'S REPORT.

In pursuance of an order of this court, entered in the above cause, bearing date the twentieth day of June, in the year of our Lord one thousand eight hundred and fifty-one (1851), I have been attended by the solicitors

of the complainants and defendants, and, in the presence of the parties attending me, I have considered of the matters thereby referred to me. And the solicitor of the complainants produced before me the indenture of mortgage in their bill mentioned, bearing date the tenth day of April, in the year of our Lord one thousand eight hundred and twenty-seven (1827), and made and executed by Seneca Sinnickson, and Ruth his wife, to James Bruere, and which said mortgage was duly acknowledged according to law by the said Seneca Sinnickson and Ruth his wife, and recorded as in the bill mentioned, as appears by endorsements thereon. And the said complainants' solicitor also produced before me the bond intended to be secured by the said mortgage, the execution of which said bond and mortgage is admitted by the said defendants in their answer in this cause, and which said bond and mortgage are marked exhibits A and B, on the part of the complainants; and having examined all the evidence taken in this case, and which is submitted with this my report, I am entirely satisfied, and accordingly so report, that the whole amount of principal and interest due on the bond and mortgage mentioned in the complainants' said bill is due and belongs to the estate of James Bruere, deceased, and that no part of the same is due to or coming to the estate of Richard Bruere, deceased, and that, for this reason, the defendants are not entitled to any equitable offset for moneys due from the estate of the said Richard Bruere, deceased; and that if there is any such right of set-off, the said Seneca Sinnickson is largely indebted to the estate of the said Richard Bruere, on the estates in the county of Salem and the advances referred to in the defendants' answer.

And I do further certify and report, that it appears, from the evidence in the case, to my entire satisfaction, that the said Seneca Sinnickson is not entitled to any offset against the complainants by reason of the bond for £1000, mentioned in his answer, as given and due to the wife of the said defendants, Seneca Sinnickson and the said Ruth Sin-



nickson, the same having been long since paid off, according to the evidence in this case.

And I do further certify and report, that I find due to the complainants this day, for principal and interest on their said bond and mortgage, after making all proper deductions and allowances, the sum of ten thousand five hundred and forty-five dollars and fifty-eight cents, as will more fully appear by the schedule hereto annexed, and forming part of this my report.

All which is most respectfully submitted.

RICHARD W. HOWELL, *M. C.*

Dated this twenty-fourth day of June, A. D., 1854.

The substance of the evidence appears in the opinion of the court. The following exceptions were taken by the defendants to the masters report:

First. For that it appears, in and by the said report, and the schedule annexed thereto, that the said master has not given credit to the said defendant for ten head of cattle of the value of twenty-five dollars, each, and forty hams, of the value of one dollar and twenty-five cents, each, amounting, in the whole, to the sum of three hundred dollars, sold and delivered by said defendant, Seneca Sinnickson, to the said James Bruere, in the month of June, 1842; whereas it was proved by two respectable witnesses that the said cattle and hams, to that amount at the least, were sold and delivered by said defendant to the said James Bruere, on account of money due to said Bruere upon his said bond, upon which said schedule is founded; and the said master ought, therefore, to have allowed the said amount as an additional credit upon said bond.

Second. For that the said master, in said schedule, has calculated interest on said bond up to the tenth day of October, 1853, and then added the interest to the principal, and cast the interest upon the whole amount of principal

and interest from that time to the date of said report, thereby charging said defendant with interest upon interest; whereas the said master ought not to have made any rest in said calculation in October, 1853, and ought not to have charged the said defendant with more than simple interest.

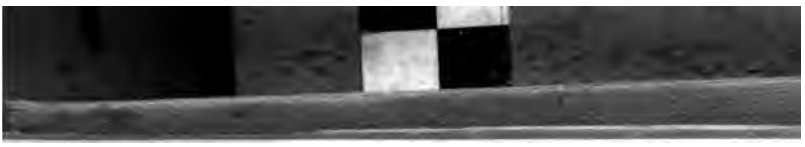
At the October term of the court of chancery, the exception to the master's report was overruled, and a final decree made in favor of the complainants, for the sum of ten thousand three hundred and thirty-four dollars and three cents, with interest from the date of said report and the costs of suit; and a sale of the mortgaged premises, to raise said moneys, was ordered.

OPINION OF THE CHANCELLOR.

The chancellor furnishes the court of errors and appeals with the following reasons for the decree made in this case.

I overruled the exception, because the question presented involves a mere matter of fact, in determining which, I am not satisfied that the master committed any error.

The opportunity afforded the master, in arriving at a correct conclusion, was much more favorable than that afforded me. It is true, I have the same evidence before me upon which the master made up his judgment. The testimony of witnesses, generally, appear all alike upon paper; and yet, every one at all acquainted with the investigation of contraverted facts, where the evidence is conflicting, appreciates the importance of seeing the witnesses confronted with each other, and of hearing their testimony as they give it. Where a correct decision depends upon the degree of credit to be attached to the witnesses examined, the appearance and manner of the witnesses are almost indispensable in forming a correct and satisfactory judgment. I do not mean to be understood as saying, that the decision of a master should be considered as conclusive upon a matter of fact: all I mean to say is, that before the court will interfere with the report of a master, upon a question of fact submitted to him, depending upon the credibility of witnes-



ses, the error of the master must satisfactorily and clearly appear. The court has always acted upon this principle, and I think it the only correct and safe one. I cannot say, that it satisfactorily appears that the master has committed an error in the matter of this exception.

The second exception is well taken. There is no reason why the master should have made a rest in the accounts in October, 1853: he should have calculated simple interest on the bond up to the date of his report.

Kingman, for appellants.

Randolph, for respondents.

The opinion of the court, unanimously affirming the decree of the chancellor, was delivered by

GREEN, C. J. The original bill in this cause was filed to foreclose a mortgage given by Sinnickson and wife to James Bruere, in his lifetime, to secure the payment of five thousand one hundred dollars in one year from date. The mortgage is dated April tenth, eighteen hundred and twenty-seven.

The matter was referred to a master, to ascertain the balance due to the complainants upon the mortgage. The master made his report, dated twenty-fourth of June, eighteen hundred and fifty-four, stating an account between the parties, and finding due to the complainants the sum of ten thousand five hundred and forty-five dollars and fifty-eight cents.

The defendant excepted to the report, because the master has not given credit to the defendant for ten head of cattle, of the value of twenty-five dollars each, and forty hams, of the value of one dollar and twenty-five cents each, (amounting in the whole to the sum of three hundred dollars,) sold and delivered by Sinnickson to Bruere in June, eighteen hundred and forty-two.

The chancellor overruled the exception, confirmed the

master's report, and made a final decree accordingly, in favor of the complainants. From this decree the defendant appealed. The sole question is, *did the master err in rejecting the credit?*

To entitle himself to an allowance of the credit, it is incumbent on the defendant to show to the satisfaction of the court—

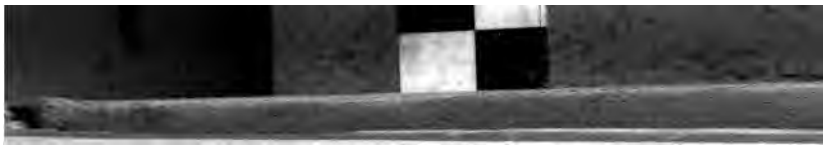
First. That the price of the articles sold was to be applied as a payment on account of the mortgage.

Second. That the payment has not been so applied.

First. The proof that the price of the articles sold and delivered by Sinnickson to Bruere was to be credited upon the mortgage at all, is not of the most satisfactory character. No receipt or written memorandum is produced in support of the claim. The testimony of a single witness is relied upon. That witness is the son of the defendant. His age at the time of the alleged transaction, does not appear. The credit claimed, is in June, eighteen hundred and forty-two. The witness was examined in June, eighteen hundred and fifty-one, nine years after the transaction to which he is called to testify. Were the defendants seeking to recover the price of the goods sold, the claim would long since have been barred by the statute of limitations. The testimony of the witness upon this point is as follows:—"I remember my uncle James Bruere coming to my father's house in May or June, eighteen hundred and forty-one or eighteen hundred and forty-two. He came after money. My father told him he had no money, but he had some cattle, which he would sell him." After stating the purchase and delivery of the cattle and some hams, the witness adds:—"I understood the price of the cattle and hams so taken by him was to be endorsed on the bond."

This is the whole evidence that the articles purchased by the complainant were to be credited on the mortgage debt. The articles were not then delivered. The witness was not present at the delivery, nor does he know what subsequently transpired between the parties respecting the price.

This evidence of the mere *understanding* of the witness,



coming from the son of the defendant, after so great a lapse of time, without any explicit proof of what the agreement actually was, is not satisfactory, and affords a very insecure foundation on which to rest for proof of payment of a mortgage debt.

Second. But admitting the sufficiency of the evidence to show that the articles purchased were to be credited on the bond, to what credit is the defendant entitled more than he has received?

Two of the plaintiff's sons testify that soon after the alleged purchase in June, eighteen hundred and forty-two, ten or twelve cattle, and about forty hams, were delivered by the defendant to Bruere. Two witnesses on the part of the complainants, entitled to at least an equal degree of credit with the defendants' witnesses, testify that there were in fact but five cattle delivered.

It further appears, that on the fourteenth of June, eighteen hundred and forty-two, the time of the alleged delivery of the cattle, there is a credit endorsed upon the bond of one hundred and thirty-one dollars, on account of interest. This, with the exception of twenty dollars received from a third person, is the only payment credited on the bond from March, eighteen hundred and thirty-nine, to May, eighteen hundred and forty-seven, a period of over eight years.

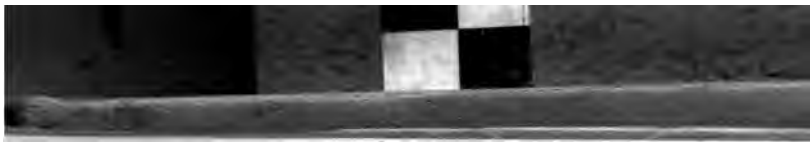
This credit is endorsed on the bond at or about the time of the delivery of the cattle. It appears by the evidence of the son that at that time the defendant had no money to pay upon the bond, and this is assigned as a reason why the cattle were offered in payment. If, then, the defendant had no money to pay with, and the cattle were offered as a substitute, how comes that credit upon the bond? Is it not reasonable to conclude that the credit is in fact the price of the articles delivered in lieu of money? True, it does not precisely correspond in amount, but the witnesses may have erred (as in fact it is obvious they did) in regard to the number or value of the articles delivered, or a part of the price may have been paid in cash or applied to the payment of

some other claim. This is more reasonable than to impeach the fairness of the credit on the bond.

It appears, moreover, that within five months after this credit the defendant gave his judgment bond for one thousand dollars in payment of arrears of interest due on the mortgage. This credit is also endorsed upon the complainant's bond. It is fair to presume that the defendant's attention was at that time specially called to the payments on the bond, to the arrears of interest, to the receipts either in his own hand or endorsed on the bond. If there was error or omission in the credits, it should and doubtless would have been corrected at that time. Under such circumstances, an attempt to correct an alleged error in the credits endorsed upon the bond, after the lapse of nine years, ought not to be regarded with favor.

There is no satisfactory evidence to show that the master erred in refusing to allow the credit.

The decree must be affirmed, with costs.



THE MORRIS CANAL AND BANKING COMPANY and others, appellants; and SAMUEL F. FISHER, respondent.

Coupon bonds payable to bearer, although not negotiable under the law merchant as bills and notes, are instruments of *a peculiar character*, and being expressly designed to be passed from hand to hand, and by common usage actually so transferred, are capable of passing by delivery so as to confer a complete title in the possessor.

Being negotiable securities usually sold in the stock market, and understood by the parties to be designed for that use, they are the subject of pledge.

It is doubted whether a debtor's own obligation has ever been held to be a pledge, or whether a third party's bond or mortgage, deposited by way of collateral or as a pledge, can be sold by the pledger, unless a known usage, or express agreement to do so is shown.

The chancellor, having been of counsel with the company in reference to the matters in controversy, called to his assistance James Wilson, one of the masters of the court, to advise with upon the hearing of this cause.

The stockholders of the Morris Canal and Banking Company, by resolutions of 10th March, 1846, authorized their directors to mortgage their canal and its appendages, tolls and revenues, in order to raise money for certain purposes on bonds of the company, to be secured by the mortgage, which was to be executed to three trustees, to be appointed by the board. The directors, by resolutions of 13th March and 28th March, 1846, appointed John J. Palmer, Zebedee Cook, and Theodore Dehon, of New York, trustees for that purpose, and authorized the president and cashier to execute the mortgage to them, and also to issue the bonds. The mortgage was executed accordingly, 28th March, 1846, and duly acknowledged and recorded, and bonds to a large amount were soon after issued. Afterwards, by resolutions of 17th March, 1848, the directors authorized the president

to borrow thirty thousand dollars on the notes of the company, and to deposit with the notes, as collateral security, the company's mortgage bonds to twice the amount of the notes. This loan was for the purpose of raising money to pay interest on the mortgage bonds which had been before issued, and to put the canal in order for navigation for that season. The president accordingly borrowed of George F. Lewis, 1st April, 1848, the sum of fifteen hundred dollars and seventy-five cents, and gave him the company's note for that amount at eight months, and deposited with Lewis the company's mortgage bonds to the amount of three thousand dollars.

The note was not paid at maturity, and Lewis, after notice to the company, advertised the bonds for sale, and had them sold at public auction in the city of Philadelphia. The complainant bought them at that sale, and paid the purchase money. The company having refused to pay him the interest on the bonds, and the trustees having declined to take proceedings to compel them to do it, the complainant filed this bill for foreclosure and sale or sequestration of the canal and its income and tolls. The company and the trustees filed separate answers. They admit the execution of the mortgage, and the issuing under it of bonds to a large amount. They also admit that the resolution of 17th March, 1848, was passed by the board, and that the amount of fifteen hundred dollars and seventy-five cents was borrowed by the president of Lewis, and the giving of the note for the loan, and the depositing of the six bonds as collateral security; but they say that the bonds were not issued for any of the purposes authorized by the stockholders, and are therefore not binding on the company, but are void: that if legally issued, yet they were not legally deposited with Lewis as collateral, and he, therefore, had no right to them, and could convey none to the complainant; that Lewis was bound to sue for his debt, and had no right whatever to sell the bonds; that the complainant knew this, and had notice of the character in which Lewis held the bonds; that the sale was not *bona fide*, and that there was collusion between Lewis and the complainant, and that com-



plainant ought to give up the bonds upon the company's paying the amount of the note, which they are ready to do.

The answer of the trustees takes the ground that the complainant could not rightfully file this bill without leave of the court first obtained. But this point was not mentioned in the argument, and is therefore supposed not to be relied on.

Dayton, for complainant.

The case made by the bill is sustained by the proofs, and the complainant has, therefore, shown himself entitled to relief according to his prayer. The bonds were issued to raise money to pay interest on the former bonds and repairs on the canal. These purposes are among those for which the company had authorized the bonds to be issued, as appears by the resolutions and the mortgage.

Defendants say that Lewis had no right to sell the bonds. But that is a question between him and the company. If he held them as mere agent or trustee of the company, and sold them a *bona fide* purchaser without notice would hold them, and the remedy of the company is against Lewis. *Hart v. Ten Eyck*, 2 *Johns. C. R.*, 99.

But we say Lewis had a right to sell the bonds after notice to the company. 2 *Kent's Com.*, 582.

This is treating the bonds as if they were held by Lewis as a pawn or pledge, though some of the cases go farther, and would give him greater rights than belong to him in that character. But we claim that he held them as a pledge for payment of the note, and that therefore he had a right to sell them on notice to the company. *Story on Bailments*, § 308–9–10–11, and case cited in note.

The letters which passed between the president of the company and J. S. Morris & Co. show that the company took the same view. They there admit the right of J. S. Morris & Co. to sell the bonds held by them. Those bonds are, like complainant's bonds, dated at the same time, and issued for a like purpose, and deposited as collateral security for a note of the company.

But defendants say, that if it is contended that the bonds left with Lewis were meant to secure him for an amount beyond the amount of the note, then the transaction was usurious, and therefore void. But Lewis has not received any more than the principal and interest of his loan. There is, therefore, no usury in the case.

The complainant being the purchaser of the bonds at a public sale, made on due notice to the company, now holds the full and absolute title to them. The defendants cannot follow them into his hands, and have them delivered up on paying the debt for which they were pledged to Lewis. *Little v. Barker*, 1 *Hoffman's Ch. R.*, 487; 2 *Story's Eq.*, § 1030–35: 4 *Watts*, 141–2; *Coote on Mortgages*, 138; 18 *Law Library*, 321, and notes; 1 *Salk.*, 154; 2 *Atk.*, 53–4.

The purchaser of a bond takes as of course the mortgage given to secure it. Fisher, as the purchaser and present holder of the bond, is therefore entitled to the benefit of the mortgage.

F. T. Frelinghuysen and *C. Parker*, for defendants.

The bonds in question in this case were not legally issued, and are therefore not binding on the company. By a resolution of the board, of 28th March, 1846, the mortgage bonds to be issued were not to exceed one hundred and fifty thousand dollars without the further action of the board. It is not pretended that these bonds are any part of that sum: they are, therefore, without authority.

They were issued for purposes not authorized by the stockholders nor expressed in the mortgage; they were issued under the resolution of 17th March, 1848, and for the purposes there mentioned, which were unauthorized. That resolution and the issuing of the bonds deposited with Lewis were a fraud upon the rights of the old bondholders, for it lessened their security under the mortgage. The issuing of the bonds being illegal, the whole transaction is void *ab initio*. Lewis took no title in the bonds, and should convey none to the complainant.

But if legally *issued*, the bonds were not legally *deposited*



with Lewis as collaterals. The directors had no right to deposit them in that way, at the rate of two dollars for one dollar, and borrow. Lewis knew, or ought to have known this; for the mortgage was on record, which showed the purposes for which the bonds were to be issued; and the depositing of them as collaterals was not one of those purposes.

Lewis had no right to sell the bonds: they were not deposited with him as a pledge, but merely as collateral security, which is a distinct thing from a pledge. *Cumber v. Hayne*, 2 *Smith's Leading Cases* 146, shows this distinction. He ought, therefore, to have sued on the bonds if necessary to recover his claim, but he could not sell them.

The bonds were not deposited with Lewis as a pledge; for to constitute the compact of pledge there must be a delivery of the pledge; and bonds are choses in action, and do not pass by delivery, but only by assignment in writing. So also of the mortgage. 2 *Hilliard on Mortgages* 343–5. Neither can a man give his own promise to pay money as a pledge for another promise of his own to pay money. It would lead to usury and extortion. It might also, by collusion of parties in buying and selling a pretended pledge, be used to evade the statute relating to confession of judgment; it is, therefore, against the policy of the law to permit it. But even if the bonds were given in pledge, they cannot be sold. The pledgee must not sell them, but sue on them to recover his debt. This is the rule with regard to commercial paper, and it must be the same with bonds. See case of *Wheeler v. Newbold*, decided by Judge Oakley in the city of New York, lately reported in newspapers, and also in Hunt's Merchants' Magazine.

But even if Lewis had a right to sell the bonds, the complainant stands in no better position than Lewis the vendor. He must hold them subject to all the equities which existed against them in the hands of Lewis. These bonds are not commercial paper, and do not enjoy the privileges of such paper in passing from hand to hand; they are mere choses in action, which can only pass by assignment in writing, so

as to give the assignee a right to sue in his own name. The complainant being merely the assignee of Lewis, all equities which existed against the bonds in Lewis' hands still exist against them. *Clute v. Robinson*, 2 *J. C. R.* 595, 612; *Norton v. Rose*, 2 *Wash. Rep.* 248.

Lewis would have been bound to deliver up the bonds on payment of the amount due on the note, and the complainant must do the same.

The complainant's counsel makes a distinction in favor of these bonds, because they are payable to bearer; but we deny that they are commercial paper. We deny that any title is given to them by delivery. *Clark v. Woolen Manufacturing Co.*, 15 *Wend.* 256.

The legal title to bonds, as distinguished from the equitable, cannot pass by delivery. *Barry v. Merchants' Exchange Co.*, 1 *Sanford's R.* 313.

But even if suit might be brought on these bonds in name of the bearer, still they are subject to the equities existing against the assignor, for they are still *bonds*, and not commercial paper. Sound policy requires that the privileges enjoyed by commercial paper, of passing by delivery, should be restrained to that class of paper. *Baldwin v. Ely*, 9 *Howard's Rep.*

The complainant must, therefore, be considered as standing in Lewis' shoes; and if Lewis were the plaintiff here he could recover no more than his debt, interest, and costs. *Hartshorne v. Allaire*, 1 *Zab.* 671.

The letters which passed between J. P. Morris and Company and the president, are not admissible. But if they are, then the letter from the president to George Bird is also admissible for defendants; and he there denies the right of Bird to sell the bonds, which counterbalances any supposed admissions in his letter to Lewis.

The construction of this transaction, by which these bonds were deposited with Lewis, ought to be governed by the intention of the parties; and it was never the intention of the company that Lewis should have three thousand dollars for fifteen hundred dollars borrowed of him.



Since the sale, Lewis has recovered in our supreme court a judgment against the company for a difference between the sum for which the bonds were sold and the amount of the note.

To allow the complainant to recover the amount of the bonds, is to compel the company to pay more than twice the sum they borrowed. This would be unjust, and a court of equity ought to prevent it.

The complainant ought to have charged in his bill that he bought the bonds without notice of the character in which Lewis held them. A defendant to a bill of disusury, who claims to be a purchaser without notice, must state want of notice. *Story's Eq. Pl.* § 805.

The rule is the same in regard to a complainant. Complainant may amend his bill in regard to new matters stated in the answer. We have in our answer charged him with notice, and he ought now to amend his bill and allege want of notice. *Story's Eq. Pl.* § 918, 884–5.

But even if complainant has any title to the bonds, he has none to the mortgage, or any part of it. A mortgage is a chose in action, and cannot pass by delivery, but only by assignment in writing.

Dayton, in reply.

The issuing of the bonds in question here, and the depositing of them as security, was done by the directors and officers; they had authority for it, and they reported their proceedings to the stockholders. It was not a fraud.

The question pending in this case does not affect the old bondholders—their security is not in any way lessened.

It is said that the bonds in the hands of the complainant are subject to all the equities which existed against the original obligees. But the three trustees are the obligees, and they are the company's own agents: the company can, therefore, have no equities against them.

These bonds are negotiable on their face, being payable to Palmer or bearer. It was the intention of the company

to make them negotiable. Bonds of this sort have been issued by many different companies, and they have been uniformly treated as negotiable. A contrary doctrine would not be tolerated. Whether a security is negotiable or not, does not depend on whether it is commercial paper; but if payable to bearer, it will pass by delivery. As to the distinction between negotiable and assignable paper, see *Miller v. Race*, 1 *Smith's Leading Cases* 258, and notes. Defendants say that there is no such thing as a sale of a chose in action which has been deposited as collateral. We answer, that however that may be, it does not affect the complainant, for he bought without notice that it had been deposited as collateral.

But *Story on Bail*, § 322–3, speaks of negotiable security as among the things sold. *Cortleyou v. Lansing*, 2 *Caines' Cas.* 200, shows that a negotiable security may be sold, though that is not the point of the case.

Garlick v. James, 12 *Johns.*, 146, treats a promissory note as a thing which may be pledged and sold.

Tucker v. Wilson, 1 *P. Wms.* 261, shows that an annuity, which is a chose in action, may be given in pledge and sold.

Evans v. Darlington, 5 *Blackford's Rep.*, 320, maintains that a negotiable security may be pledged and sold. This case turns on the fact that the sale which had been made was *without notice.*

In the case of *Wheeler v. Newbold*, cited from the newspapers, Judge Oakley, who decided it, does not cite a single authority in support of his opinion; and he suspended the entry of judgment upon his decision until the point could be argued before a full bench at the general term. Besides this, the counsel who argued before him against the validity of the sale of the commercial paper which had been pledged, took no objection to it, except only that the sale had been a private one, while they insisted that it should have been a a public sale. In addition to this, it must be remarked that newspaper reports of law cases are often so imperfect and inaccurate as to be unreliable.

Complainant is not bound to allege in this bill that he



bought the bonds without notice. How could he allege want of notice of facts which may have just been made known to him by the defendants' answer? If the defendants wished to put the complainant on oath upon that point, they could have done so by exhibiting interogatories to him.

Defendants say that complainant is not entitled to benefit of the mortgage. But he bought the bonds and the mortgage. Security, *pro tanto*, follows as an incident. But even if he is not entitled to the security of the mortgage, he is still entitled to a decree for the amount of the bonds under the general prayer for relief.

THE MASTER. The complainant in this cause is the holder, and claims to be the owner by a full and absolute title, of six bonds of the Morris Canal and Banking Company, purchased by him at public sale for a valuable consideration. They are dated 31st March, 1848, and are for the payment of the sum of five hundred dollars, each, payable on 1st April, 1850, to John J. Palmer or bearer, with interest payable half yearly, and having coupons for the interest annexed. In the body of each bond it is stated as follows: "the holder of this bond is entitled to the security to be derived from a first mortgage on the estate and chartered rights of the company, dated 28th March, 1846, authorized by the board of directors, at a meeting held on the 10th day of March, in the year last aforesaid, and duly recorded, executed, and delivered to John J. Palmer, Zebedee M. Cook, and Theodore Dehon, of the city of New York, as trustees, in trust to secure the full payment of such bonds as should be issued under the same; each bond, to clearly identify the same, bearing the signature of the trustees; the whole amount of bonds to be issued not to exceed the sum of seven hundred thousand dollars."

Upon the margin of each bond is a certificate, signed by these three trustees, whereby they certify that the bond is included in the mortgage upon the canal, which had been executed to them in trust for the bondholders.

Before the filing of this bill, the complainant applied to the company to pay him the interest which had become due

upon these six bonds held by him, which they refused to do. He then applied to the trustees to take the proper measures to compel the company to pay him the interest; but the trustees declined to do so. He then filed this bill for the foreclosure of the equity of redemption in the mortgaged property, praying a sale of the canal and its appendages, or a sequestration of its tolls and revenues, in order to satisfy his claim. The mortgage is in proper form, and is executed under the seal of the company, and appears to be a valid lien upon the property described in it for the benefit of the holders of the bonds which it was intended to secure.

If, then, the bonds held by the complainant are valid bonds of the company, and are entitled to the benefit of the security of the mortgage, and if the complainant is the owner of the bonds by a complete and absolute title, he is entitled to the relief which he seeks.

The defendants insist that the bonds were not issued for any of the purposes authorized by the stockholders and directors, and that therefore the bonds are not binding upon the company, but are fraudulent and void. The resolution of the stockholders authorizing the execution of the mortgage, and the bonds to be secured by it, was passed 10th March, 1846, and the resolutions of the board of directors directing the president and cashier to execute and deliver the bonds were passed 28th March, 1846. The form of the mortgage, which was afterwards executed, was fixed by these resolutions of the board, and is therein recited at length, and the purposes for which the bonds to be secured by it were to be issued are set forth in the mortgage. The mortgage recites that the company, "for the purpose of raising money to pay off the debts incurred in improving, enlarging, and repairing their canal, and of raising money to be expended in further improving and perfecting the same, are about to make, execute, and issue certain bonds for sums not to exceed in the whole seven hundred thousand dollars." And further, that with a view to enable the said company "to raise the said moneys, and thereby secure the continued progress and operation of their said canal, and

obtain further time finally to discharge the expenses of the improvements already made, the said company, by their board of directors, have resolved to secure the payment of said moneys by the pledge and hypothecation of their said canal, with its appurtenances, and the actual revenues, chartered rights, and properties of the said company," &c.

By the resolutions passed at the same meeting of the board, the president and cashier were authorized and directed to execute and deliver the said bonds mentioned in the mortgage. But it was provided that the amount of the bonds to be issued should not exceed the sum of four hundred and fifty thousand dollars, without the further action of the board. One of these resolutions also fixed the salary of the three trustees, for the service to be rendered by them, at one-half of one per cent., each, on the amount of the bonds to be issued, and directed that a sufficient amount of the bonds to pay the salary should be retained in the hands of the loan committee, to be paid to the trustees at a time fixed by previous resolutions.

This shows the authority under which the bonds were to be executed by the president and cashier, and the purposes for which they were to be issued and used. It also shows that the trustees were appointed by the company, and were to be paid by the company for their services. Soon after these resolutions were passed, bonds were, in pursuance of this authority, executed and issued to a large amount.

Afterwards, on the 17th March, 1848, the company were in need of money to pay the interest on those bonds and to put the canal in order for navigation for the season then approaching, and the board of directors, at a meeting held on that day, adopted a resolution, by which it is declared that the president is authorized to borrow thirty thousand dollars to pay the "interest coming due on the 1st of April, and the expense of putting the canal in order for navigation for the present year; and to give the company's notes, at such time as he may deem consistent with the interest of the company, and deposit with said company's notes, the

company's mortgage bonds for twice the amount of the notes."

Under this last resolution, the president of the company, on the 1st of April, 1848, borrowed of George F. Lewis, of Philadelphia, the sum of fifteen hundred dollars and seventy-five cents, and gave him the company's note, bearing date on that day, for that sum, and at the same time deposited with him, as collateral security, six of the company's mortgage bonds, of five hundred dollars, each. The note is made payable to the company's own order eight months after date, is signed by the president, and endorsed by the cashier, and there is a certificate across the face of the note not signed, but proved to be in the handwriting of the secretary of the company, which states that the said six bonds were deposited with the note as collateral security. These are the bonds in controversy in this suit. I think that the defendants' objection, that these bonds were not issued for any of the purposes authorized by the stockholders or mentioned in the mortgage, and are therefore void, is not well taken. The money borrowed of Lewis was to pay interest on the mortgage bonds which had been before issued, and which it is not denied were properly issued, and also for the purpose of putting the canal in order for the season then approaching. These purposes for which this money was borrowed are, in my opinion, clearly included within those for which money was to be raised on the mortgage, and the bonds to be issued under it, as expressed in the mortgage itself. It is there recited that the bonds to be secured by the mortgage were to be issued for the purpose of raising money to pay off "the debt incurred in improving, enlarging, and repairing the canal, and of raising money to be expended in further improving and perfecting the same."

Now the bonds which had been issued, and on which the interest was coming due, were issued to raise money for the purposes just mentioned. To borrow money to pay that interest, and to give as security for that loan other bonds also secured by the mortgage, was surely no departure from



the design and purpose with which the mortgage was given. It did not increase the debt under it, nor was the money raised by the loan perverted to unauthorized purposes, but was still applied to pay the debt secured by the mortgage. The interest on the debt was a part of the debt itself, and, as to so much of the loan as was to be applied to putting the canal in order for navigation for that season, it was plainly within the authority "to raise money to be expended in further improving and perfecting the same," as expressed in the resolutions of the stockholders and in the mortgage.

It is objected further by the defendants, that even if it be admitted that the money raised by this loan from Lewis was for purposes mentioned in the mortgage, yet that the directors and officers of the company had no authority to deposit the bonds as collateral security, at the rate of two dollars for one dollar borrowed; and that, in so doing, they transcended their powers, and moreover committed a *fraud upon the other bondholders*, by lessening their mortgage security, and that therefore the bonds in question in this suit are not binding upon the company, but are void, and that this court ought to protect the other bondholders against such fraud. The objection is not that the bonds were not properly *executed*, nor that the money raised on them was raised or used for an improper or unauthorized purpose for the bonds were executed by the officers of the company, in whom full authority for that purpose was vested; and it is admitted, for the purposes of this argument upon this point, that the money raised on them was for purposes mentioned in the mortgage and authorized by the stockholders. The objection, therefore, goes only to the *mode* and *manner* in which the directors and officers of the company disposed of the bonds in raising money for purposes for which they were authorized to raise it upon those bonds. The stockholders, in authorizing those bonds to be executed and delivered, and money to be raised upon them for the purposes mentioned, did not prescribe the manner in which it should be done. They left the bonds in

the hands of their directors and officers without any restrictions or directions upon that point, having, no doubt, full confidence that they would, according to their best judgment, so use them for the end proposed as would most advance the interests of the company; and I think it must be considered that it was the intention of the stockholders to leave the matter to the discretion of the directors and officers.

But further on this point. The officers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions, and their acts within the scope of such usage, practice, and course of business will bind the bank in favor of third persons having no knowledge to the contrary. The cashier of a bank is usually intrusted with all the funds of the bank in cash, notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He is considered as the executive officer of the bank, *through whom* and by whom the money transactions of the bank, in paying or receiving debts and discharging or transferring securities, are to be conducted. *Story on Agency*, § 114; *Fleckner v. U. S. Bank*, 8 *Wheaton's R.*, 338.

Now the stockholders had authorized the execution of these bonds, and the borrowing of the money upon them, and left them in the hands of the officers of the company, with no restrictions upon them as to the mode of their using the bonds for that purpose.

Then in borrowing money, and giving those bonds as security for it, they had authority to use them, according to the course of business, in such transactions. They had a right to deposit them as collateral; for that mode of using bonds and other such securities is within the usual course and usage of business, both of incorporated companies and individuals. And if it had been done by the cashier alone, it would, by the law of agency, as laid down in the authority just cited, have been binding on the company.

But it was not done by him alone. It was authorized by

an express and formal resolution of the board of directors, under which the note was given, and the bonds deposited as collateral security for its payment; the note was signed by the president and endorsed by the cashier; the secretary of the company certified, upon the face of the note, that the bonds were deposited as collateral security for it, and the three trustees, who in this were acting as the agents of the company, certified that the holder of the bonds was entitled to the security of the mortgage. The directors and all the officers of the company, therefore, appear to have participated in this transaction; and if it were now held that it is not binding upon the company, but is fraudulent and void, there would be no safety in dealing with the officers of a corporation.

But it was insisted, on the argument, that even if they had the right to deposit the bonds as collateral security for the loan, yet that they had no right to do it at the rate of two dollars for one dollar borrowed. I think that that was a matter fairly within their discretion. The amount of a collateral is usually greater than the debt which it is intended to secure; how much greater it shall be must depend upon the circumstances of each particular case. By the annual report of the directors to the stockholders, dated 17th March, 1848, a printed copy of which is in evidence, it appears that the credit of the company had become so much depressed that its mortgage bonds could not be negotiated at par. That may have been the reason why they deposited them at the rate of two dollars for one dollar, as collateral security for the money borrowed of Lewis, which was obtained two weeks after the date of that report; and if so, it can hardly be said that such security was so extravagant and unreasonable as to amount to a fraud and a breach of authority on the part of the persons making it. But it is not necessary to examine into their reasons; it is enough that that matter was in the discretion of the directors and officers, and that there is no evidence that they abused their trust.

In addition to what I have already said on this part of

the case, there is much reason to believe that this mode of using the company's bonds was sanctioned by the stockholders. Copies of some of the annual reports made by the board of directors to the stockholders are in evidence in the case. In the report dated 17th March, 1848, page 25, it is stated that it "became necessary, to enable the company to meet pressing demands, again to negotiate further loans, for which it gave its note to the amount of seventy-seven thousand eight hundred and six dollars and fifty cents, to secure the payment of which there was deposited with those notes, one hundred and fifty-five thousand six hundred and fifty dollars six per cent. mortgage bonds as collateral."

And in the report dated 2d April, 1849, page six, it is stated as follows: "About the first of April last there was borrowed the sum of fifteen thousand three hundred and twenty-three dollars and fifty-nine cents on the company's notes at six and eight months, with which were deposited, as collateral security, the mortgage bonds of the company for twice the amount of the notes." The time of this first mentioned loan (the first of April, 1848,) is the date of the note given to Lewis, and for which the six bonds in controversy here were deposited as collateral security, and it is a note at eight months. It is not unreasonable to conclude, therefore, that the loan from him was a part of the sum of fifteen thousand three hundred and twenty-three dollars and fifty-nine cents mentioned in the report, and secured in the manner there stated.

This mode of using the company's mortgage bonds as collateral security to notes given for loans, and to twice the amount of the notes, appears, therefore, to have been resorted to at different times, and to have been regularly reported by the directors to the stockholders, and the making of the loans of which the money obtained from Lewis was probably a part, and which was secured in the same way, was also reported to them. There is no evidence that the stockholders ever objected to that mode of using the bonds, or laid any restraint upon it; and I think it must be considered to have received their silent acquiescence, if not their express ap-



probation. So far as the *company* is concerned, therefore, this objection must fail. Nor do I think it can prevail for the *bondholders*, for they took their bonds knowing that the mortgage by which they were to be secured was intended to cover bonds to an amount not exceeding seven hundred thousand dollars. If the bonds issued to raise money for the purposes mentioned in the mortgage do not exceed that amount, they cannot complain that their security is lessened. The money raised on the bonds held by the complainant was for such purposes; and there is no evidence that the bonds which have been issued, including the bonds of the complainant, amount to the sum of seven hundred thousand dollars, nor is there any evidence that the property covered by the mortgage is not sufficient to pay them all.

I consider, therefore, that the bonds in question in this suit were legally and properly issued under the authority given by the stockholders, and that the depositing of them with Lewis, as collateral security for the loan obtained from him, was and is binding upon the company, and is not a fraud upon the other bondholders.

The company's note, given to Lewis for the loan, was not paid at maturity, and he thereupon, on 12th December, 1848, gave notice to the president of the company that the six bonds held by him as collateral security to the note would be sold at public sale on the 19th of that month, at seven o'clock, P. M., at the Philadelphia Exchange, by M. Thomas & Sons, auctioneers, and that the company would be held accountable for the deficiency, if any, between the proceeds of the sale and the amount of the note. The president acknowledged the receipt of this notice, in a letter to Lewis, and at the same time stated to him that the bonds were not left to be used in the way he proposed; that, being deposited as collateral, they could only be used upon the inability of the company to pay the note, and that that inability was not established by the note not being paid at maturity; that the company protested against the proposed sale, and that Lewis would be held responsible to the company for the full amount of the bonds in case such sale should be made. The sale,

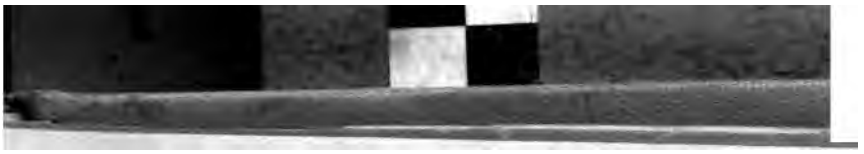
however, was proceeded wit It had been advertised in pamphlets and in at least four daily papers in the city of Philadelphia, and at the time and place mentioned in the advertisements, and in the notice sent to the president of the company, the bonds were sold at public sale, by the auctioneers before named, to the complainant.

It does not appear that Lewis was present at the sale, nor did it appear by the advertisements, or in any other way to the persons attending it, that he had any interest in the bonds, or was in any way connected with the sale. The bonds were merely advertised to be sold "without reserve, for account of whom it may concern."

On the part of the complainant, it is insisted that the bonds were deposited with Lewis, as a pawn or pledge for the payment of the note at maturity, and on the note not being so paid, he had a right to sell them at public sale, on due notice to the company; and that, by the sale, the title to the bonds passed to the complainant, and that he is entitled to the amount of them, and to the benefit of the security of the mortgage.

The defendants, on the other hand, say that the bonds were not deposited as a pawn or pledge, but as a collateral security, and that that is a distinct and different thing from a pledge; that a man is not permitted to give his own promise to pay money as a pledge for another promise of his own to pay money, since it would lead to usury and extortion, and might, by collusion of parties, be used to evade the statute relating to confession of judgments; that bonds cannot, from their very nature, be given in pledge, because it is essential to the making of a pledge that there be a delivery of it, and bonds, it is insisted, cannot pass by delivery, but only by assignment in writing; that Lewis was bound first to sue on the note, and, if he failed to recover his debt in that way, then to sue on the bonds, and not to sell them; that, for these reasons, Lewis had no right to sell the bonds at all, and that the sale passed no title or interest in them to the complainant.

I do not think that the position of the defendants, that a



bond deposited as collateral security is a distinct and different thing from a pawn or pledge, can be maintained. I find no authority for that distinction; on the contrary, the reported cases show that notes, bonds, and other things deposited as collateral security have been frequently regarded as pawns or pledges. *Vanderzee v. Willis*, 3 *Bro. C. R.* 21; *Garlick v. James*, 12 *Johns.* 146.

Nor do I see the soundness of the objection, that a man is not to be permitted to give as a pledge his promise to pay money, as security for another promise of his own to pay money, on the ground that it would lead to usury and extortion and an evasion of the statute relating to confession of judgments. How does it lead to usury? The lender of the money would not and could not get more than his loan and interest. In the present case Lewis does not and cannot get more than his debt and interest. I do not see in such a transaction any temptation to parties to resort to it with the hope of obtaining usurious interest or of extorting money from the necessities of others; neither do I perceive how it could be used to evade the statute relating to confession of judgments without a resort to fraud and collusion. If these were practised they would make the transaction void. And the same thing may be said of many other proceedings which are in themselves honest and lawful. There is no pretence of any fraud or collusion on the part of any of the parties to the transaction now under consideration, and it would never do to lay it down as a rule, that an act done with fair and honest purposes shall be void because other parties might do a like act with a fraudulent intent to evade the laws.

The defendants are not correct in saying that bonds cannot pass by delivery, but only by assignment in writing. Bonds may pass by delivery, and without written assignment.

The delivery of a bond for a valuable consideration is a good assignment of it without writing, and passes the bond, and the debt due upon it, to the assignee. *Hutchings v.*

Low, 1 *Green* 246, and *Allen v. Pancoast*, *Spencer's Rep.* 68, and the cases there cited.

Are *bonds*, then, a species of personal property which may be pledged? Story, in speaking of the things which may be the subject of a pledge, says, "these are ordinarily goods and chattels, but money, debts, negotiable instruments, choses in action, and indeed, any other valuable thing of a personal nature, such as patent rights and manuscripts, may, by the common law, be delivered in pledge." *Story on Bail*, § 290. And his text appears to be fully sustained by the authorities which he cites.

Kent also says, "all kinds of personal property that are vested and tangible, and also negotiable paper, may be the subject of a pledge; and choses in action resting on written contract may be assigned in pledge." 2 *Kent's Com.* 577. Among the things here mentioned as the subject of pledge bonds are certainly included.

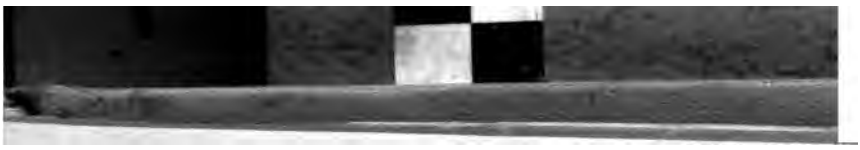
In *Vanderzee v. Willis*, 3 *Bro. C. R.* 21, bonds were, with other things, pledged for the security of a promissory note; and no doubt seems to have been entertained by any of the counsel who argued the case, nor by the Lord Chancellor who decided it, that they could be so pledged.

In *Hart v. Ten Eyck*, 2 *Johns. C. R.* 100, and in 2 *Kent's Com.* 582, bonds are mentioned as among those things for which bills to redeem were frequently filed in chancery.

That bonds may be given in pledge, therefore, is a doctrine which seems to be well sustained by authority.

The bonds in question in this case were delivered by the company, through its officers, to Lewis, as security for the payment, at maturity, of the note given to him for the loan, and he had a right to keep them until that debt was discharged.

This was, I think, plainly the intention of the parties to that transaction; and I am therefore of opinion that the bonds were delivered to him as a pledge. A pledge is a bailment of personal property as security for some debt or engagement. *Story on Bail*, § 286. It is also defined by Kent to be a bailment or delivery of goods by a debtor to



his creditor, to be kept until the debt be discharged. 2 *Kent's Com.* 577. See, also, *Garlick v. James*, 12 *Johns. Rep* 146; *Cortleyou v. Lansing*, 2 *Caines' Ca.* 200. The deposit of these bonds with Lewis comes strictly within the definition of a pledge, as laid down by these and other authorities.

The note was not paid at maturity; the company, therefore, failed to perform the engagement for which the bonds had been pledged. The defendants have argued that Lewis, in order to recover his debt, was bound to sue first on the note; but I find no authority for that position. He had his election to do so or to resort to his remedy upon the bonds, by having them sold under a decree of foreclosure or by selling them himself on due notice to the company.

Story, on this subject says: "Another right resulting by the common law from the contract of pledge, is the right to sell the pledge when there has been a default in the pledger in complying with his engagement. Such a right does not divest the general property of the pawner, but still leaves in him a right of redemption. But if the pledge is not redeemed within the stipulated time, by a due performance of the contract for which it is security, the pawnee has then a right to require a sale to be made thereof, in order to have his debt or indemnity. The common law of England existing in the time of Glanville seems to have required a judicial process to justify the sale, or at least to destroy the right of redemption. But the law, as at present established, leaves an election to the pawnee. He may file a bill in equity against the pawner for a foreclosure and sale, or he may proceed to sell *ex mero motu* upon giving due notice of his intention to the pledger. In the latter case, if the sale is *bona fide* and reasonably made, it will be equally as obligatory as in the first case." *Story on Bail*, § 309–310.

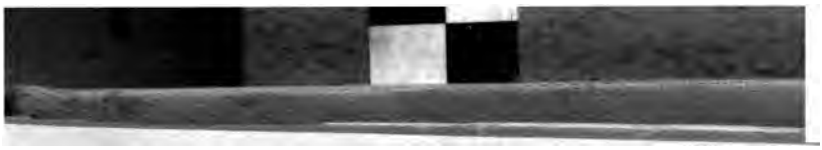
The same doctrine is laid down in 2 *Kent's Com.* 582, and in *Parker v. Brancker*, 22 *Pick.* 40. But the defendants have argued, that although this is the general rule in regard to property given in pledge, yet that bonds form an exception to it. I do not, however, find any authority or any well

considered case which sustains such exception, or which shows that bonds given in pledge are not subject to the same rules as other property which has been pledged. The weight of the authorities and the whole current of decisions are directly the other way.

In 4 *Kent's Com.* 139, it is said, "the pawnee, by bill in chancery, may bar the debtor's right of redemption, and have the chattels sold. This has frequently been done in the case of stock, *bonds*, plate, or other personal property pledged for the payment of debts. But without any bill to redeem, the creditor, on a pledge or mortgage of chattels, may sell at auction, on giving reasonable opportunity to the debtor to redeem, and apprising him of the time and place of sale, and this is the more convenient and usual practice." So that the right of the pledger to sell *bonds* is here expressly maintained. And why, it may be asked, should such bonds as are in question here be an exception to the general rule? They are, as has been stated, made payable to bearer, with coupons for interest annexed. Bonds of this description are, in point of fact, often sold, and the market or current price of some classes of them is frequently advertised and quoted. To sell them, is therefore not an extraordinary proceeding, but one usual among individuals in their private transactions.

I consider, therefore, that Lewis had a right, on the failure of the company to pay the note at maturity, to proceed to sell the bonds in one of the two modes already mentioned. He chose to sell on his own authority without judicial process, and that is said by Kent to be "the more convenient and usual practice."

Certain letters, which passed between the president of the company and J. P. Morris & Co., of Philadelphia, were offered in evidence by the complainant, in order to show that the company had admitted that J. P. Morris & Co., with whom the company's mortgage bonds had been deposited as security for a note, had the right to sell them on the failure of the company to pay the note. The defendants objected to this evidence as inadmissible, but offered, on



their part, in case it should be admitted, another letter from the president of the company to George Bird, with whom like bonds had, under like circumstances, been deposited as security, and who proposed to sell them, in which the company protested against his right to do so. These letters were all read at the hearing, subject to the exception taken. I am in doubt as to the admissibility of this evidence, and I do not consider it necessary to examine or decide the question; for, in the conclusion I have come to, I have not given any weight to these letters either way. In my view of the case, Lewis had, by force of the rules of law relating to pledges, a right to sell the bonds in the manner before stated, and that right is not in any wise affected by any admissions or protests on the part of the company.

When Lewis proceeded to sell, he gave notice to the company of the time and place of the intended sale. The notice seems to have been a proper one, and no objection has been made to its reasonableness or sufficiency. The sale was advertised in a full and ample manner; it was made by established auctioneers, at a public place, and seems to have been fairly and openly conducted. It is charged, in the answers of the company, that, in buying the bonds, the complainant acted in collusion with Lewis, who, it is charged, was to have an interest in the purchase; but there is no evidence whatever to sustain this allegation. The complainant appears to have acted fairly in the matter, and to have purchased on his own account, without any connection with Lewis or any knowledge that he had any right or interest in the bonds. The complainant is therefore to be considered as the *bona fide* purchaser of the bonds for a valuable consideration, at a public sale fairly made and authorized by law. and whereof due notice had been given to the company.

It is further insisted by the defendants, that even if Lewis had a right to sell the bonds in the way he did, and even if the complainant bought them *bona fide*, yet that he cannot hold them with any other or higher right or title than Lewis had in them; that he must stand in Lewis' shoes, and

take the bonds subject to all equities existing against them in the hands of Lewis; and various authorities were cited, on the argument, in order to show that where bonds have been assigned, the assignee takes them subject to all equities which existed against them in the hands of the obligee or assignor.

And it is argued that the same rules must apply to these bonds in the hands of the complainant; that Lewis held them only as collaterals, and subject to be delivered up on payment of the principal and interest due on the note; and it is argued that the complainant is merely his assignee, and must hold them subject to the same claim, and must deliver them up on payment by the company of the amount of the note.

By the delivery of the bonds to Lewis, in pledge for the payment of the note, he acquired only a *special* property in them, the *general* property remaining in the company. *Story on Bail*, § 287; *Cortleyou v. Lansing*, 2 *Caines' Ca.*, 202.

And the effect of the default in the payment of the note at maturity was not to vest the entire property in the bonds in Lewis, but to give him a power to sell them, he accounting to the company for the surplus remaining, if any, after paying the note. *Story on Bail*, § 308; *Coggs v. Barnard*, 1 *Smith's Leading Ca.*, 99, and notes. So that at the time of the sale by Lewis, there was in him only a special property in the bonds, the general property in them still remaining in the company.

Now I consider that the sale of the bonds at public auction to the complainant did not operate simply as a transfer to him of the right which Lewis had in them at that time. It was not merely an assignment by Lewis of his right in them to the complainant, it was much more. It was a sale of the whole interest in the bonds, and conveyed the whole property and title in them to the complainant. If this were not so, and if the sale operated merely as a transfer or assignment to the complainant of the special property which Lewis had in them, there would be no need



of a sale at all, for the same thing might be much more easily accomplished by a more private assignment in the ordinary way. The sale made by Lewis, of his own authority, without application to any court, was, as it is laid down by the authorities already cited, equally as obligatory as if it had been made under the authority of a decree of foreclosure. Now if the complainant had bought these bonds at a sale made under such decree, it would not be pretended that the company would have the right to follow them into his hands, and have them given up on paying the debt for which they had been pledged. How, then, can they follow them now? This case, being in my view very different from that of a mere ordinary assignment of bonds in the way usual in private transactions, and the complainant standing not as the assignee of Lewis' right, but as the purchaser of the whole title and property in the bonds, I do not consider that the cases which have been cited to show the rules of law respecting the rights of parties upon an assignment of bonds as applicable here. The defendants' objection under this head is in effect the same as saying, that the right which the company had to redeem the bonds while they were in the hands of Lewis upon paying the amount of the note still exists after the sale, and that they have the same right against them now in the hands of the complainant. But this is manifestly unreasonoble, and opposed to the very idea of a sale of the bonds. Where is the necessity or propriety of a sale, if such is the case? What is the inducement to any person to become a purchaser, if he must at any time give up the bonds on these terms? And where does this alleged right end? Does it follow the bonds into the hands of the purchaser, and, if he assign them, does it go with them into the hands of his assignee, and so on without end? All the authorities which I have examined speak of the right to redeem the pledge as existing until the sale, and they plainly consider it as existing no longer, whether the sale be made under the decree of foreclosure or by the pledgee of his own authority with-

out any previous application to the courts. *Story on Bail*, § 309, 310; 4 *Kent's Com.*, 139.

Under this view of the case, it is of no consequence whether the complainant had notice or not that the bonds had been deposited with Lewis as a pledge; for if the pledgee had a right to sell the pledge absolutely, the knowledge of the right and authority by which he does it cannot destroy nor affect the title of the purchaser.

The defendants insisted that the complainant ought to have charged in his bill that he bought without notice. But I do not think so; the case made by the bill is complete without it. If he had notice, and the defendants thought that his rights were thereby affected, it was competent for them to prove it; but I do not think that it was necessary for the complainant to aver want of notice in this bill.

But there is another view of this case, which in my opinion forbids that any right to redeem, or any other equitable claim which the company may have had upon these bonds should follow them into the hands of the complainant. These bonds must, I think, be regarded as negotiable securities, and capable of passing by delivery in the same way as a promissory note payable to bearer or a bill of exchange endorsed in blank.

The bonds are payable to John J. Palmer or bearer, with coupons annexed for interest payable half-yearly. Bonds of this description were unknown to the ancient common law; they are of comparatively modern origin. They have been issued in this country in very large amounts, and have entered extensively into the business operations of the community. And by the corporations which have issued them, and among all persons who in the course of business have had occasion to receive them or to pass them to others, or to deal with them in any way, they have always been considered and treated as securities which pass from hand to hand by delivery. This was asserted upon the argument, and not denied, and cannot, I think, be controverted. The usage in regard to them must have been understood by the company when they issued these bonds. By the terms of



them, they are payable to the bearer; and it was, no doubt, the intention of the company, in making and issuing them, that the bearer, whoever he might be, should be entitled to the amount. I think, therefore, that to hold these bonds to be negotiable, is to construe them according to the intention of the maker, and the general usage in regard to securities of this description.

The case of *Gorgier v. Mieville et al.*, 3 *Barn. & Cress.* 45, was the case of a bond of the king of Prussia, in which he declared himself and his successors bound to every person, for the time being holder of the bond, for the payment of the principal and interest. The plaintiff had deposited the bond in the hands of Agassig & Co., to hold for his benefit, and receive the interest upon it. Agassig & Co., being in want of money, pledged the bond to the defendants, and this was an action of trover to recover the bond.

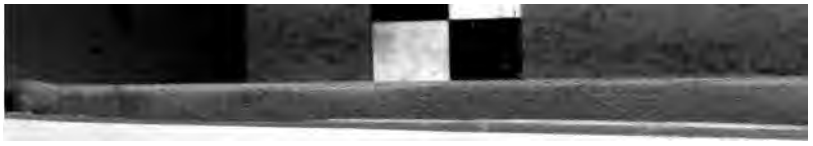
It was proved, at the trial, that bonds of this description were sold in the market, and passed from hand to hand daily, like exchange bills, at a reasonable price, according to the state of the market. The opinion of the court was against the plaintiff, and under its direction the jury found a verdict for the defendants. On a rule *nisi* for a new trial, the case was fully argued, and it was decided by the court that the rule must be discharged, and judgment entered for the defendants. In delivering the opinion, Abbott, chief justice, said: "This instrument, in its form, is an acknowledgment, by the king of Prussia, that the sum mentioned in the bond is due to every person who shall for the time being be the holder of it, and the principal and interest is payable in a certain mode and at certain periods mentioned in the bond. It is, therefore, in its nature precisely analogous to a bank note payable to bearer or to a bill of exchange endorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whosoever is the holder of it has the power to give title to any person honestly acquiring it."

The case of *Clark v. Farmers' Manufacturing Co.*, 15 *Wend.* 256, was cited by the defendant's counsel as holding

a contrary doctrine. But I do not so understand it. It was an action on a sealed bill of the defendants in that case, which was declared on as a promissory note. Chief Justice Nelson delivered the opinion of the court, and held that it could not be so declared on, and that it was not a negotiable instrument. In referring to the case of *Gorgier v. Mieville et al.*, he spoke of the decision there as resting upon usage and the nature of the security. And though he does not assent to all the reasonings of the case, he does not deny nor seem to doubt that the decision was right, and was rightly placed upon that ground. The case of *Gorgier v. Mieville* was fully argued and deliberately considered, and its reasonings and conclusions appear to me to be sound and just. I think that the rule there laid down is applicable to the present case, and that the bonds in question must be considered negotiable. To hold a contrary doctrine, and to make such bonds, in the transfer from one person to another, subject to all the rules which apply to ordinary bonds would be contrary to the intention and terms of the instruments, and the usage in relation to them, and might unsettle many most important transactions and produce great mischief and confusion.

Holding these bonds of the complainants, therefore, to be negotiable, they are, under the authorities already cited, the subject of pledge, and having been pledged, and the pledgee having lawfully sold them, that sale is binding upon all parties, and conveys a perfect title to the purchaser. *Story on Bail*, § 290, 300.

The defendants, however, have insisted that they were not pledged to Lewis, and, therefore, he had no right to sell them. But the holder of negotiable paper, even though he be not the owner, may sell or transfer it to another person, who, if he takes it without notice of the fraud acquires a good title against the owner. The complainant, as has been already shown, bought these bonds without notice of the character in which Lewis held them, and the transaction is therefore binding upon the company, and the complainant has a good title against them. This depends on well settled



principles of law. *Story on Bail*, § 296; *Grant v. Vaughn*, 3 *Burr.* 1516; *Bay v. Coddington*, 5 *Johns. C. R.* 54.

It was earnestly urged, upon the argument, by the defendants' counsel, that if the complainant should be held to be entitled to recover the amount of the bonds, that the company will be compelled to pay almost double the amount they borrowed of Lewis, and that this would be a hard result, and one which a court of equity ought to prevent. But when property, which has been given in pledge for the payment of a debt or the performance of an agreement, is sold in default of the pledgee to perform his contract, it must often happen that it will be sold at what he considers a great sacrifice. This must be so in the very nature of things, and it is one of the risks which he incurred when he made the pledge. But if it was fairly sold he has no cause of complaint. Such sale must be maintained, or the law of pledge must be abolished. Suppose, in the present case, that the purchase by the complainant had proved to be a bad one, and that he had given much more for the bonds than they were worth, and must be the loser to a large amount. He could not call on any one to refund to him; he must abide by his contract, and bear whatever burthens it might impose. If, then, his purchase will prove a good one, shall he not also have its benefits? There would be great injustice in laying down a rule which would compel a purchaser in such case to bear all the loss if he made a bad purchase, and to surrender all the advantages of it if it turned out to be a good one.

It is a circumstance worthy of consideration, and entitled to weight in this case, that the company, though fully apprised of the sale, took no measures to be represented there, and gave no notice whatever to the public or to the purchasers attending the sale that they had any claim upon the bonds, or any objection to their being sold. When notice of the intended sale was given to the company, they took no steps to warn purchasers. They merely protested to Lewis against the sale, and informed him that they would hold him responsible. If they considered that they had a remedy

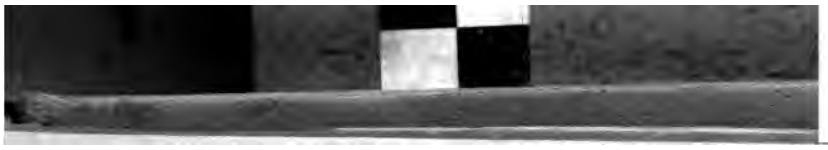
against him, and meant to rely upon that, it is still open to them. But why did they not notify *purchasers* of their claim? They knew the nature of the bonds, that they were securities which in the usual course of business were considered and treated as negotiable, and which constantly passed from hand to hand as negotiable paper. The sale of such instruments, both in private and at public sale, was of frequent occurrence. There was nothing in the bonds themselves, nor in the fact or manner of their being sold, to warn purchasers that their title would be impeached or to put them on their guard against any claims on the bonds from any quarter whatever. It was reasonable that they should believe that whoever bought the bonds would be the owner of them by a complete and legal title. Under these circumstances, is it just and equitable for the company now to come forward, and set up a claim upon them? Ought they not rather to be considered as standing silently by, having a full knowledge of the sale, and acquiescing in the proceeding, at least so far as it concerned purchasers.

In every view which I have been able to take of the case, it seems to me clear that the complainant is the absolute owner of the bonds, and of the debt secured by them, free from all claim upon them on the part of the defendants.

It is further contended by the defendants, that even if the complainant is the owner of the bonds, yet that he is not entitled to the benefit of the mortgage security, because the mortgage was not assigned to him, and, being a chose in action, it cannot pass by delivery, but only by assignment in writing.

But it has been decided in this, as well as in other states, that a mortgage may pass by delivery without written assignment. *Hutchings v. Low*, 1 *Green*, 246; *Allen v. Pancoast, Spencer* 68, and cases there cited.

It is also well settled that the debt secured by a mortgage is the principal thing: the mortgage is only an incident to the debt, and passes with the debt. *Martin v. Moulin*, 2 *Burr.*, 978; *Green v. Hart*, 1 *Johns. C. R.*, 580;



Langdon v. Buel, 9 *Wend.*, 80; *Stevenson v. Black*, *Saxton* 343; *Bolles v. Wade et al.*, 3 *Green's C. R.*, 460.

I am, therefore, of opinion that the complainant is entitled to the benefit of the mortgage to the extent of the bonds held by him; that he is entitled to have the amount due upon them, with his costs to be taxed, raised, and paid by sale or sequestration of the mortgaged property, and that it should be referred to a master to ascertain and report the amount, to the end that a final decree may be made. And I do respectfully advise the chancellor that an interlocutory decree and order of reference should be made accordingly.

J. WILSON, *M. C. C.*

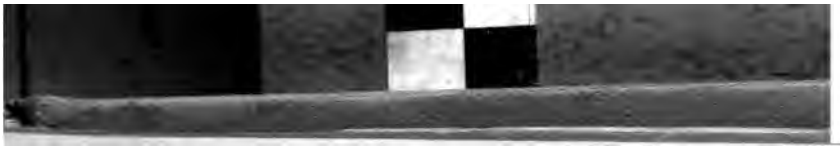
February term, 1854.

The opinion of the court of appeals was delivered by

ELMER, J. The complainant, Samuel F. Fisher, was shown to be the *bona fide* holder of six bonds of the Morris Canal and Banking Company, the defendants, and the question upon which the case on this appeal mainly turns, is, whether the honest acquisition of these securities, without notice of any defect in the title of the seller, if a defect there was, confers on him a title similar to that acquired by a *bona fide* holder of money, bills of exchange, and promissory notes, payable to bearer. So far as we are aware, this is a case of the first impression, and it is certainly one of no little importance. Similar bonds have been issued, within a few years, by our numerous railroad and canal companies, to an immense amount, and are daily sold by the brokers and others, and passed from hand to hand by delivery, without any formal assignment, and without inquiry as to the title of the possessor.

The case has been elaborately and ably argued on both sides. On behalf of the appellants, it was insisted that these bonds being under seal, are in law specialities, and although in terms payable to bearer, if they are assignable by delivery only, it is by force of our statute, which leaves them

subject, in the hands of the assignee, to all the equities to which they were liable in the hands of the assignor. *Rev. Stat.* 801. That such is the law, in the case of ordinary bonds, cannot be questioned. By the common law, such bonds cannot be assigned, so as to give a right of action to the assignee, although payable in terms to an assignee, or bearer. *Glyn v. Baker*, 13 *East.* 509; *Clark v. Farmers'. Man. Co.*, 15 *Wend.* 256. Our statute, however, authorizes an assignment, whether the bond is or is not payable in terms to an assignee. *Sheppard v. Stites*, 2 *Hal.* 90. And such assignment, it has been held, may be by a delivery for a valuable consideration, without any writing. *Allen v. Pancoast*, *Spen.* 68. The mere insertion, therefore, of words making these bonds payable on their face to a bearer, is by no means decisive of the question now in dispute. Nor do we think it would necessarily follow that they would be subject to whatever equitable defence might be made against them in the hands of the assignor, if they were not legally assignable so that the assignee could sue on them in his own name. Smith, in his note to the case of *Miller v. Race*, *Smith L. C.* 363, seems to consider that such would be the result; and no doubt the ability of the holder to sue in his own name, is essential to render an instrument negotiable, in the full sense of that expression. But courts of equity and courts of law protect the interest of a *bona fide* assignee. If, however, the assignee takes no legal, but only an equitable title, they protect also the equities existing at the time of the assignment between the maker of the instrument and the assignor. If the bonds in question are transferable by delivery, so as to confer a complete title in the possessor, it is not as instruments negotiable under the law of merchants as bills and notes are, but as instruments of a peculiar character, expressly designed to be passed from hand to hand, and by a common usage known to all, actually so transferred. That they are on their face payable to bearer, is, of course, an important and perhaps indispensable circumstance to show that this was in fact their design, and that they are so used. But the usage itself, and in a case



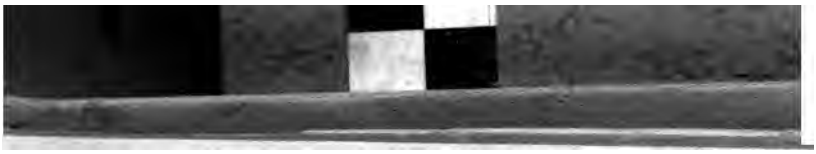
like this, where the party issuing them is before the court denying the holder's title, the manner in which they were issued and used by the company itself, are the important facts which must have the principal influence in determining their true character. If, in point of fact, they are of such a character that a full title was intended to be conferred on any person who became the *bona fide* possessor of them, and this intention was not in contravention of the law, the original maker has no equity against the assignee. By the act of issuing a security, which, although in some respects like an ordinary bond, was in its main, characteristic of being designed to pass freely from hand to hand, and of being so held out to the world, essentially different, all such equities were designedly relinquished, and ought not to be regarded by courts of law or of equity.

That under ordinary circumstances, the property of bank notes and of bills and promissory notes payable on their face, or by a blank endorsement to a bearer, follows the possession, has been long settled. By analogy to this class of cases, the exigencies of business have from time to time introduced other securities into the same category. The court of King's Bench seems to have hesitated to recognize India bonds as belonging to it. *Glyn v. Baker.* But parliament immediately interfered and declared them negotiable instruments. Exchequer bills were so regarded, in the case of *Wookey v. Pole*, 4 *Barn. and Ad.* 1. In the case of *Gorgier v. Mieville*, 3 *Bar. and Cress.* 45, bonds of the king of Prussia, which were shown to be ordinarily passed from hand to hand by delivery, and so designed, were held to be like money or bills, so as to give a *bona fide* possessor the legal title. And in the case of *Lang v. Smyth*, 7 *Bing.* 284, the same principle was applied to the case of instruments issued by the government of Naples, although in that case they were held not to be negotiable, because it was found that they did not usually circulate without a certificate, which did not accompany them. Parsons, in his recent work on contracts, vol. 1, page 240, expresses the opinion

that the common bonds of railroads fall within the reasoning and authority of these cases.

The manner in which these bonds are engraved, with coupons making the interest payable half yearly to the bearer of them, and all the evidence before us, conspire to show that the company which issued them, and which now disputes the title of the holder upon the ground that they put them into the hands of the seller for a special purpose, which did not authorize him to dispose of them as he did, really intended them to circulate, as in fact they do. This design is indeed quite as apparent as if it was engraved on their face in express words. The objection now made, that the legal character of the instrument adopted is such as to frustrate this design, certainly comes with a bad grace from the party which put them in circulation. Even as between third parties, we suppose the common usage to transfer them by delivery, without inquiry as to the title of the transferrer, would justify us in holding these securities to differ from common obligations, in being so far negotiable that the *bona fide* possessor shall be held to have a good title. But the case is still stronger against the party which made and issued them, with full knowledge of the prevailing usage, and with the manifest design that they should be so circulated. To permit such parties to dispute this result of the usage, would be to permit them to take advantage of their own wrong. And besides, the obvious interest of the companies is, that these bonds should be saleable, free from all questions of equity. They are generally issued for the express purpose of raising money by their sale. To declare them subject to the equities existing in the case of ordinary bonds, upon every transfer of them, would be to strike a blow at the credit of the great mass of these securities now in the market, the consequences of which it would be impossible to predict.

We are, therefore, of opinion that the title of the present possessor of these bonds must be held to be complete. His right to proceed on the mortgage, in the manner adopted, follows as a necessary consequence. As to the objections



that the bonds were not issued for any purposes authorized by the stockholders and directors, and that they are illegal, fraudulent, and void, and that the bill of complaint is not properly drawn, it is only necessary to express our concurrence in the conclusions to which the master came, and in the reasoning upon which he founded them.

This view of the case renders it unnecessary to enter at large upon the investigation of the question so elaborately discussed by counsel, whether Mr. Lewis had a right to sell the bonds as he did. Some of the views taken by the master, in his very able opinion on this subject, seem questionable. If the bonds in dispute ought to be considered as placed in Lewis' hands by way of pledge, it is probably because they were securities usually sold in the stock market, and understood by the parties to be designed for that use; and not because a party's ordinary bond or mortgage, deposited as a collateral, could be so regarded. No case was produced where the debtor's own obligation has been held to be a pledge for a debt due by simple contract. Nor do we think it clear that even a third party's bond or mortgage, deposited by way of a collateral, or as a pledge, can be sold by the pledgee, in default of payment, after notice to the pledger, unless a known usage or express agreement to do so is shown. But it is not intended to express any decided opinion on these questions. For the reasons assigned, the decree appealed from must be affirmed, each party to pay their own costs.

Decree affirmed unanimously.



Between ARCHER GIFFORD, administrator of ELIZABETH HAIT, appellants, and HERMAN THORN and the executor of JOHN RUTHERFORD, deceased, respondents.

POTTS, J., ON APPEAL.

A bequest to W. J. T., "when he arrives at the age of twenty-one years, to him and his heirs forever," is a contingent legacy and vests only on condition that the legatee live to the age of twenty-one; if he die before that age the legacy lapses.

The assignment in this case from Elizabeth Hait to Thorn, held not a case of bargain and sale; and therefore not within the rule that gross inadequacy is sufficient to avoid a sale.

Held, that the facts proved do not make out a case of fraud or imposition in procuring the assignment.

Held, that the proofs do not establish that Elizabeth Hait was of imbecile mind at the time of executing the assignment.

——— IN CHANCERY, BY GREEN, CHIEF JUSTICE.

A bequest in the following words: "I give and bequeath all the residue and remainder of my property, both in England and America, of every kind and description whatever, to W. J. T. *when* he arrives at the age of twenty-one years," conveys to the legatee a contingent interest only; and upon the death of the legatee before attaining the age of twenty-one, the property bequeathed goes to the next of kin of the testator.

Where the time specified in the bequest is annexed to the payment only, the legacy vests immediately on the death of the testator, but where the time is annexed to the gift itself, the legacy does not vest until the legatee attains the age specified.

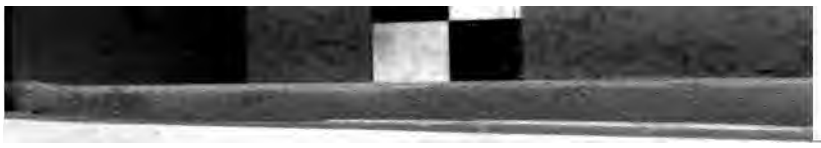
The rule applies as well to bequests of the residue, as to particular legacies.

But if it appears from any expression or direction contained in the will, or if it can be fairly deduced from the entire instrument, that the intention of the testator was that the legacy should vest immediately, such intention shall prevail.

Where the interest of the legacy is directed to be paid to the legatee, until he receive the principal, or where the legacy is placed in the hands of trustees for the exclusive benefit of the legatee, until it is directed to be paid over, the legacy will be deemed vested.

Upon a sale of property, gross inadequacy of price, joined with inequality in the position of the contracting parties, is a ground of equitable relief.

But where a sale or transfer is made from other than pecuniary considerations, or where it is uninfluenced by considerations arising out of the value of the estate this principle of equity can have no application.



Where the vendor acquiesces for a long time in a transfer of property, without questioning its validity, or impeaching its good faith, it will not be set aside as fraudulent at the instance of the representatives of the vendor.

A court of equity will not look back of the decree of another court to inquire into the merits of the case, if there was no fraud in the procurement of the decree.

It is not material to the conclusiveness of a decree, whether it was obtained by consent, or by a decision of the court, upon the legal principles involved in the controversy.

A judgment by default or by confession is, in its nature, as conclusive upon the rights of the parties as a judgment upon demurrer or verdict.

Where a party seeks to avoid a decree rendered in a cause in which an appearance was entered for him by a solicitor, on the ground that the court had no jurisdiction over his person, he must shew affirmatively that the solicitor had no authority to enter his appearance.

There must be reasonable diligence to call into exercise the powers of a court of equity.

Persons suing *in autre droit* are not liable for costs.

The chancellor having been of counsel for one of the parties, the cause was heard on the pleadings and proofs before the Hon. Henry W. Green, and pursuant to his advice and opinion a decree was entered dismissing the complainant's bill without costs. From that decree the complainant appeals to this court. The material issues made by the pleadings sufficiently appear in the opinion of the Chief Justice.

GREEN, C. J. The bill in this cause is filed by the administrator of Elizabeth Hait, to recover a distributive share of the residue of the personal estate of William Jauncey, deceased, to which it is alleged that the said Elizabeth Hait became entitled as one of the next of kin of the said William Jauncey.

The right and interest of Elizabeth Hait, the complainant's intestate in the estate real and personal of which William Jauncey may have died intestate, was assigned by her to Herman Thorn, one of the defendants, by deed of assignment, bearing date on the 27th of March, 1833. That assignment the bill seeks to avoid, as obtained by fraud and undue influence.

In pursuance of that assignment, and of a decree of the court of chancery of the state of New York, the share and interest of Elizabeth Hait in the residue of the estate of

William Jauncey, was paid by John Rutherford, the surviving executor of Jauncey, to James A. Hamilton, the administrator of William Jauncey Thorn, and by him paid to Herman Thorn, the father and next of kin to the said William Jauncey Thorn. For the purposes of this cause, the payment of the money by the surviving executor of Jauncey, will be regarded as a payment by him directly to Herman Thorn. The bill prays an account and a decree for the recovery of all the moneys thus paid, or which have come to the hands of Herman Thorn, with the consent of John Rutherford.

The material issues made by the defendant's answer are:

First. That all the personal estate of William Jauncey was absolutely disposed of in and by his last will and testament. That there was no intestacy as to any portion of the said personal estate, and that no part thereof did or could vest in the said Elizabeth Hait as his next of kin.

Second. That all the right and interest to which Elizabeth Hait was or could have been entitled in the estate of William Jauncey, in case of his intestacy, was assigned by the said Elizabeth Hait to Herman Thorn, one of the defendants, by a legal, valid and operative deed of assignment, in no wise tainted with fraud.

Third. That the share and interest of the said Elizabeth Hait, if any there was, in the said estate, was paid by the surviving executor of the said William Jauncey to Herman Thorn, under and by virtue of a decree of the court of chancery of the state of New York; that the said decree remains in full force, and is final and conclusive upon the rights of the parties.

Fourth. That the claim of the complainant is barred by the statute of limitations—more than six years having elapsed from the time of the payment of the legacy by the surviving executor of William Jauncey before the filing of the bill in this cause.

William Jauncey, of the city of New York, died on the 19th of September, 1828. At the time of his death he was seized and possessed of a very large and valuable real and



personal estate in England and America. By his will, executed and published in due form of law, having given and devised large portions of his real and personal estate, the testator further gave and bequeathed as follows:

"I give and bequeath all the residue and remainder of my property, both in England and America, of every kind and description whatever, to the said William Jauncey Thorn, when he arrives at the age of twenty-one years, to him and his heirs forever."

The legatee, William Jauncey Thorn, (having, in compliance with the desire and injunction of the testator, assumed the name of William Jauncey,) died before he arrived at the age of twenty-one years.

Whether, by the terms of the will, the residuary legacy vested, upon the death of the testator, in the legatee, so as to be transmissible to his representatives; or whether the legacy was contingent upon the legatee's attaining the age of twenty-one years, and by his death before that period lapsed, leaving the testator, as to the property included in the legacy, intestate, is the question submitted for consideration.

The general rule applicable to this question, adopted both in the ecclesiastical courts and courts of equity, is well settled. Where the time specified in the bequest is annexed to the payment only, as where the legacy is given, payable or to be paid when the legatee attains the age of twenty-one years, the legacy vests immediately upon the death of the testator. It is a present gift. The time of payment only is postponed. But where the time is annexed not to the payment only, but to the gift itself, as when the legacy is given to the legatee at twenty-one, or "if" or "when" he attains the age of twenty-one, the legacy does not vest until the legatee attains that age. The gift is upon the condition that the legatee shall attain the age specified. His attaining that age is a condition precedent; and if the condition be not fulfilled, the legacy never vests. The cases upon this subject are very numerous, and with few exceptions the rule will be

found to have been for more than a century inflexibly maintained.

This distinction as to the form of the bequest was recognized in the case of *Stapleton v. Cheales*, in the year 1711; and in *Fonnereau v. Fonnereau*, decided in 1748, Lord Hardwicke declared that the distinction was then absolutely settled. *Stapleton v. Cheales*, *Prec. in Chan.* 317; *Cruse v. Barley*, 3 *P. W.* 20; *Smell v. Dee*, *Salk* 415; *Fonnereau v. Fonnereau*, 3 *Atk.* 645; *Goss v. Nelson*, 1 *Burr* 227; *Lane v. Goudge*, 9 *Vesey* 229; *Swinburne on Wills*, 313, 315.

In *May v. Wood*, 3 *Brown's Chan. Cas.* 417, Lord Alvanley, Master of the Rolls, recognizing the general rule, held, nevertheless, that where a legacy was given when the legatee attained a given age, the term "when" should not be deemed a condition precedent, upon which the legacy was to vest, but as merely denoting the period of payment. He is reported as saying that "all the cases for half a century upon pecuniary legacies had determined that word, not as denoting a condition precedent, but as only making the period when the party shall have the full benefit of the gift." The accuracy of the report, both as to the statement of the fact and the principle, has been justly questioned.

In the later case of *Hanson v. Graham*, 6 *Vesey* 239, the question was examined by Sir William Grant, Master of the Rolls, with his accustomed care and ability. It was held by him, both upon principle and upon authority, that the word "when," standing alone and unqualified in the gift of a legacy, is a word of condition denoting the time when the gift is to take effect in substance, and not the mere time of payment. That a gift "at" twenty-one, or "if" or "when" the legatee shall attain the age of twenty-one, were all one and the same, and in each of these cases, if the legatee die before that time, the legacy lapses. Citing this doctrine from the decision in *Stapleton v. Cheales*, he adds, "I do not find any case in which this position has ever been contradicted."

The modern authorities regard the doctrine as fully settled in accordance with the ancient rule, and the views ex-



pressed in *Hanson v. Graham.* 1 *Jarman on Wills*, 764; 1 *Roper on Leg.* 553; 2 *Williams on Exrs.* 1052; *Patterson v. Ellis' Exrs.*, 11 *Wend.* 260.

By the civil law, says Roper, (adopting the views of Sir William Grant,) the words "when" and "if" are of the same import in speaking of an uncertain event. Both are words of condition annexed to the very gift of the legacy, when unexplained by the context of the will. The construction is the same in courts of equity, which adopts the rules of the civil code upon this subject. 1 *Roper on Leg.* 570.

It is contended, however, that although this doctrine may be established in respect to particular legacies, it does not apply where a residue is the subject of the bequest, because its effect would be to create an intestacy in regard to a portion of the testator's property. There is certainly (as was observed by the Master of the Rolls, in *Leake v. Robinson*, 2 *Mer.* 385) a strong disposition in the court to construe a residuary clause so as to prevent an intestacy in regard to any part of the testator's property. This point was strongly relied on by Lord Alvanley in *Booth v. Booth*, 4 *Vesey*, 399, although on a previous occasion he appeared to regard the distinction as groundless. But neither in that case, nor in any other which has been referred to, was the decision rested upon that ground alone, and a different rule of construction applied to the bequest of a residue. It is undoubtedly a circumstance to which some weight may attach, and which, in a doubtful case, may control the construction. *Love v. L'Estrange*, 3 *Bro. Par. Cas.* 397; *May v. Wood*, 3 *Bro. Chan. Cas.* 473; *Hanson v. Graham*, 6 *Vesey*, 248; *Jones v. McIlwain*, 1 *Russ.* 220; *Leake v. Robinson*, 2 *Mer.* 386.

The general rule applies as well to bequests of the residue as to particular legacies; a decisive objection to adopting a different rule of construction would be, that it would necessarily lead to different interpretations of the same language in different parts of the same instrument.

The terms of the residuary clause standing alone confer upon the legatee, not a vested but a contingent interest only. The construction of the terms of a particular legacy is, how-

ever, always liable to be controlled by the intent of the testator apparent in other parts of the will. If, therefore, it appears from any expression or direction contained in the will, or if it can fairly be deduced from the entire instrument that the intention of the testator was that the legacy shall vest immediately, such intention shall prevail. Under such circumstances, words which standing alone would operate as words of condition, will be construed to designate only the time when the interest shall take effect in possession. It is insisted in the present case, that the fact that the estate is placed in the hands of trustees, and that the residuary legatee is to be maintained out of the trust fund, will operate to control the words of the residuary clause, and vest the legacy immediately on the death of the testator. Where the interest of the legacy is directed to be paid to the legatee until he receive the principal, or where the legacy is placed in the hands of trustees for the exclusive benefit of the legatee until it is directed to be paid over, the legacy will be deemed vested. *Stapleton v. Cheales*, *Prec. in Chan.* 317; *Lane v. Goudge*, 9 *Vesey*, 229; *Hanson v. Graham*, 6 *Vesey*, 249; *Hoath v. Hoath*, 2 *Bro. Chan. Cas.* 3; *Fonnereau v. Fonnereau*, 3 *Atk.* 645; 1 *Jarman*, 764; 1 *Roper*, 572.

But in the present instance there is no severance of the legacy from the rest of the estate, and no appropriation of the interest to the separate benefit of the legatee; on the contrary, the whole estate, real and personal, is vested in the hands of trustees, who are to receive the entire interest, rents, and profits for the general purposes of the will. The legatee is to receive not the interest of the residuary legacy, but a maintenance and education from the general fund in common with the other children of Jane Mary Thorn. Such a disposition of the estate can raise no presumption of an intention on the part of the testator that the legacy should vest immediately.

The indications of the testator's intention to be deduced from the general provisions of the will, seem to militate strongly against the construction contended for by the de-



fendant's counsel. The testator has bequeathed by apt words several vested legacies. In regard to some of them the time of payment is designated. All the legacies to the children of Jane Mary Thorn are by apt words bequeathed as contingent legacies; they are all given either when the legatee arrives at the age of twenty-one, or upon his or her arriving at that age. These legacies, exclusive of the residue, exceed the sum of three hundred thousand dollars. If these legacies be construed to be contingent, then, upon the death of any of the children other than the residuary legatee, his or her share would fall into the residue of the estate and vest in the residuary legatee, the peculiar object of the testator's bounty. It is only upon the death of the residuary legatee that a result could follow hostile to the general design of the testator.

But if these legacies be construed as vested, then, upon the death of each child living, his or her interest in the estate would go not to the residuary legatee or one of the children of Jane Mary Thorn, for whom it was the peculiar design of the testator to provide, but to the father of the children whose name is not mentioned in the will, and whom it is apparent that the testator never designed to benefit. Such a result cannot be presumed to have been within the intention of the testator.

From the language of the residuary clause, as well as from the entire will, I am of opinion that by well settled rules of construction the bequest of the residuary estate conveyed to the legatee not a vested but a contingent interest only—that his attaining the age of twenty-one years was a condition precedent to the vesting of the legacy—that by the death of the legatee before he attained that age, the legacy lapsed —and, as to that portion of his estate, that William Jauncey, the testator, died intestate, and consequently that Elizabeth Hait, the complainant's intestate, was entitled to a distributive share of the residue, as one of the next of kin of the testator.

Second. This leads to the second inquiry, viz: Whether the assignment made by Elizabeth Hait to Herman Thorn,

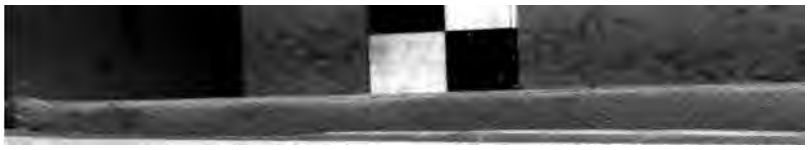
of her interest in the residuary estate of William Jauncey, was valid or procured through fraud.

The bill charges that the assignment was executed in the presence of Francis Griffin, the solicitor and counsel of Herman Thorn, the assignee; that at the time of the execution of the instrument, the amount and nature of Miss Hait's interest in the estate was not made known to her; that she was told that her interest was not worth over five thousand or six thousand dollars; that it was particularly concealed from her what was given to the other next of kin for their interest in the estate; that Griffin joined with Thorn in entreaties, threats, and arguments to induce her to execute the instrument; and that, as counsel, he advised her that she had no interest in the residuary estate, and that she had better take whatever Thorn might offer her.

The assignment bears date and purports to have been executed on the 27th of March, 1833, in the presence of Matthias Brant as subscribing witness. The subscribing witness is dead. His signature is proved, and it is also proved that he was a neighbor of Miss Hait's, and on terms of friendly intercourse with her. The deed of assignment purports to have been re-acknowledged on the 3d of May, 1833, in the presence of Francis Griffin.

Mr. Griffin has been examined as a witness. He states that he was a solicitor of Herman Thorn in two suits pending in the court of chancery of New York in relation to this residuary estate. That on the 3d of May, 1833, he accompanied Colonel Thorn to Miss Hait's residence. That the original deed of assignment of Miss Hait to Thorn was there produced, and re-acknowledged by Miss Hait. At the same time she produced a bond for six thousand dollars, given to her by Colonel Thorn, bearing even date with the assignment, and executed in the presence of Matthias Brant as subscribing witness. The bond was paid, and a receipt for the amount was endorsed upon the assignment, and signed by Miss Hait, in the presence of the witness. This statement is verified by the production of the papers.

Miss Hait executed at the same time, in the presence of



the witness, two other papers purporting to be authorities for solicitors to appear for her in the two suits pending in New York, in each of which she was a party defendant. The papers were read over to her, and their contents and object fully explained. She read them herself carefully; said that she was nervous about signing papers; that she was not accustomed to it, and that when she executed the assignment in favor of Thorn she had hoped the matter was closed, and that she would have no more papers to sign; but that it was her wish that Mr. Thorn should have the full benefit of the assignment, and that if it was necessary for the purpose of facilitating the arrangement she would sign them; and on being told that it would facilitate matters she signed the papers in the presence of Mr. Griffin, who thereupon signed them as subscribing witness.

The witness further testifies that Miss Hait appeared to be a woman of good common sense and understanding, and to understand entirely what she was about; that no misrepresentations or concealment, threats, undue influence, or influence of any kind was made use of towards her—and that she seemed perfectly willing to carry out the arrangement.

A compromise had at that time been agreed on between Herman Thorn and five of the next of kin of William Jauncey, by which Thorn had agreed to pay them two hundred and ten thousand dollars for their interest, being at the rate of forty thousand dollars per share for five shares, and ten thousand dollars for law charges. This whole compromise and the terms of it were told to Miss Hait, and were the subject of conversation. The residuary estate was spoken of as being very large. There was no concealment of any material fact. The whole conversation was based on the idea that, in receiving the six thousand dollars, Miss Hait was giving up to Mr. Thorn a large substantial advantage.

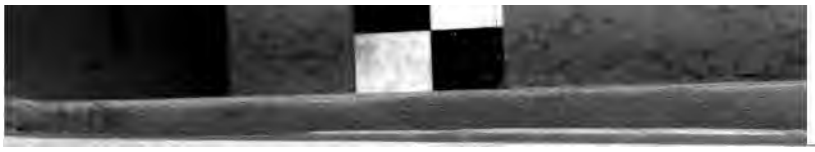
This evidence was given many years after the transaction to which it relates, but the witness states that his memory was refreshed by a full written memorandum of what passed, made on the evening of the same day.

The testimony is certainly open to comment, and requires

the strictest scrutiny, on the ground that it comes from the solicitor and counsel of Thorn, who accompanied him to the residence of Miss Hait in that capacity, and for the purpose of becoming a witness to the transaction. But he is the subscribing witness to several of the papers—the only surviving witness to any of them, or to any part of the transaction between the parties in relation to the assignment. The bill moreover charges directly, that he actively aided and participated in the alleged fraud. He is, therefore, not only a competent, but a proper and necessary witness in the cause. He was a counsellor of good standing, and, so far as appears, of irreproachable character at the New York bar. He is unquestionably an intelligent witness. His evidence is in no material point contradicted or impeached. In many particulars he is strongly corroborated by other evidence in the cause. He relies upon a written memorandum, made on the very day of the transaction. He speaks of matters to which his attention was particularly directed. He speaks not of matters of opinion only, but mainly and in great detail to matters of fact, in regard to which there is little room for misapprehension or mistake.

There is no reason to discredit the testimony; indeed, upon a careful review of the whole case, there appears to be no evidence in the cause upon which the court can with more safety rely. It will be conceded, that it is entitled to at least as much credence as the testimony of witnesses who detail from memory, conversations and language heard more than eighteen years previous to their examination, upon a subject in which they were not particularly interested, and to which their attention was not specially directed. Such is the character of much of the evidence in this cause, upon which the charge of actual fraud is sought to be maintained. There would be manifest danger in resting a decree upon such evidence, even in the absence of conflicting testimony.

The evidence of Griffin cannot be regarded merely as proof of the confirmation of the original contract. It goes much further. The facts and circumstances detailed by him tend most strongly to prove that no such fraud was practised in



procuring the original execution of the instrument, as is charged in the complainant's bill. The evidence is very explicit and decisive in negation of the charges of actual fraud. After the death of the subscribing witness to the assignment, in the absence of all testimony as to the circumstances under which the instrument was originally executed the evidence affords a satisfactory answer to the charges of concealment and misrepresentation of material circumstances contained in the bill of complaint.

Aside from the existence of actual fraud, regarding the assignment from Miss Hait to Colonel Thorn as a mere matter of bargain and sale, as an ordinary transfer of property by vendor to purchaser for a consideration, there is much in the evidence tending to support a charge of constructive fraud, which might entitle the complainant to relief in equity.

The parties to the negotiation did not stand upon equal ground. The purchaser was a man of business, in the prime of life, having superior opportunities of knowing, and probably knowing better than the vendor, the value of the subject matter of the contract.

The vendor was an unmarried female of the age of seventy-two years, of nervous and excitable temperament, of retired habits, leading a secluded life in the country, certainly not accustomed, and by her habits of life in some measure disqualified, to transact important business.

The contract was made by the vendor without the advice of counsel. It was consummated without the presence of a friend, against the wishes of her nearest relatives, and contrary to the advice of at least one of her neighbors, whom she previously consulted.

The consideration of the assignment was grossly inadequate. The price paid bore no relation whatever to the value of the property transferred.

In a case of bargain and sale, these circumstances alone, aside from any evidence of an actual fraud, are of a nature to quicken the vigilance, and to call into active exercise the protective powers of a court of equity. They afford grounds

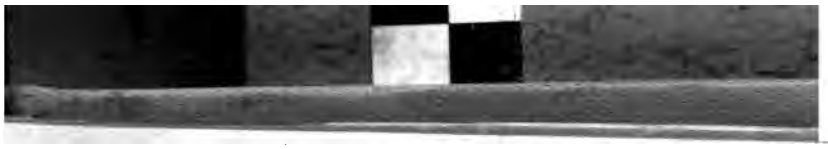
upon which the court may interfere to relieve against unfair and unconscionable contracts.

It is not necessary, nor is it designed, to express any opinion as to the conclusion to which the evidence upon this point would lead, if the assignment should be viewed in the light of an ordinary sale. A careful and deliberate examination of the evidence in the cause, aided by the full and elaborate arguments of counsel, have led me satisfactorily to the conclusion, that the assignment by Miss Hait to Colonel Thorn was not a mere bargain and sale for value, but that the transfer was made from other than pecuniary considerations. The grounds of that conclusion I shall proceed to state.

William Jauncey Thorn, the residuary legatee under the will of William Jauncey, died in England on the 18th of November, 1830. On the 26th of February, 1831, letters of administration upon his estate were granted, by the surrogate of the county of New York, to James A. Hamilton. He was the agent, and acted at the instance of Herman Thorn. In July, 1831, a bill was filed in the court of chancery of the state of New York, by all the next of kin of William Jauncey, except Elizabeth Hait, to recover their shares of this residuary estate. In that bill, although solicited so to do, she refused to unite, and was necessarily made a party defendant. This conduct could have been produced by no influence of Colonel Thorn or of his family. They were all that time in Europe, and had been there several years; so far as appears, they had no correspondence whatever with Miss Hait until after the filing of the bill. James A. Hamilton's first interview with her was had some months subsequently, with the view of inducing her to aid in the defence.

It may doubtless be suggested that her aversion to litigation may have deterred her from uniting in that suit for the recovery of her legal rights, but it is apparent from the evidence that she was influenced by other considerations.

This is very apparent from her correspondence with Mrs. Thorn. That correspondence was commenced not by Mrs.



Thorn, but by Miss Hait. Her first letter was written on the 15th of June, 1831, just before the bill was filed, when the measure must have been in contemplation, and probably after she had been requested to unite in it. That letter is not in evidence, but its tenor may readily be inferred from the tone of the reply.

Under date of Paris, August 29th, 1831, Mrs. Thorn writes: "I had the pleasure of receiving your very kind letter of June 15th at Dieppe, where I was with all the family for change of air.——I think when the estate is settled I shall return home, and hope we shall then meet again; but I could not support being there now, to be harrassed daily, as my heart is too sad and heavy to bear trouble if I can avoid it. Besides, we could do nothing by being present, and we have every confidence in Mr. Hamilton, and are certain that he will do every thing in his power for us. The result we must leave to that great and merciful Being in whose power it is to give and to take."

Under date of Paris, 4th October, 1831, Mrs. Thorn again writes: "Your last letter advises me to come home, and you express your regret that we are not in America to attend to our affairs ourselves, as you have learned that persons, Mr. Chapman and others, are devising plans to deprive us of our inheritance. If I would return I cannot now, as my situation prevents me." That Miss Hait had thus written to Mrs. Thorn cannot be doubted; a false statement in regard to the contents of Miss Hait's letter would never have been ventured upon in reply, no matter with what motive the reply was written.

It appears, then, that Miss Hait not only refused to unite with the other next of kin of William Jauncey for the recovery of her interest in this estate, but that she immediately wrote to Mrs. Thorn at Paris, requesting her to return home, and informing her that plans were being devised to deprive her and her children of their inheritance.

It appears from other parts of the evidence, that to others Miss Hait denounced the attempt as wicked and unjust, as being contrary to the well known intention of William Jaun-

cey. Mrs. Thorn appeals to her to aid herself and her children in recovering the property, in opposition to the next of kin, upon the ground of Miss Hait's knowledge of the well known intentions and oft-repeated declarations of William Jauncey made in the hearing of Miss Hait, that the estate should go to Mrs. Thorn and her children. That appeal would not have been made, under the circumstances, had it not been founded in truth. It shows at least a clear conviction on the mind of Mrs. Thorn, that such were the views of Miss Hait.

Previous to the assignment to Thorn, Miss Hait had made an assignment of all her interest in the residuary estate to her three nephews, William, Jonathan E., and Benjamin Hoyt. According to her own account, the assignment was obtained from her by one of her nephews, upon the representations that he would give Mrs. Thorn one half the amount recovered, and that that was the only mode in which any part of the estate could be secured to her. Upon being undeceived as to the necessity of any such measure to protect Mrs. Thorn's interest, she demanded the return of the instrument, which was accordingly surrendered and cancelled.

There is offered in evidence on the part of the complainant, a deed of assignment from Miss Hait, to her three nephews, of her interest in the residuary estate of William Jauncey, for the consideration of one dollar and natural love and affection. The instrument bears date on the 8th of December, 1832. It is, of course, not relied on as a valid subsisting instrument. It would be fatal to the claim of the complainant. It seems never to have been acted upon, nor is it very clear for what purpose it was offered in evidence, except to impeach the accuracy of Miss Hait's statement, or of Mr. Griffin's testimony. It does not necessarily do either. It does show, however, that her interest was assigned to her nephews, without any pecuniary consideration, and that from some cause that they were not at liberty to use it.

Dr. Waldo Brown was called upon by Miss Hait, to consult him in regard to making the assignment to Herman



Thorn. Thorn was present, urging that the assignment should be made. Miss Hait stated the amount that she was to receive, and that it was for her nephews. The advice of the witness was asked by Miss Hait, and given. He advised against the assignment, and refused to sign as a witness. He makes no suggestion that the price was inadequate, or that she was in danger of being defrauded. The only reasons assigned were that she had previously promised it to her nephews, and that she would violate her promise if she assigned to Thorn.

The assignment to Herman Thorn purports to be made, not in consideration of six thousand dollars, but for one dollar, and for divers other good causes and considerations. The bond for six thousand dollars, given at the time of the transfer, expresses upon its face that the money was for her three nephews, viz: two thousand dollars for Benjamin, two thousand dollars for William, and two thousand dollars for Edwards. Mr. Griffin, who was present when the money was paid, testifies that Miss Hait said that the money was designed for her nephews. She wanted nothing for herself. The entire consideration, six thousand dollars, was subsequently paid by Miss Hait to her nephews, not one dollar of it having been retained for her own use.

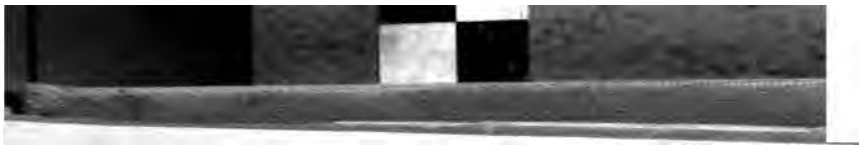
It is in evidence that both before and after the assignment to Colonel Thorn she manifested much excitement and agitation in regard to it. She feared that she had done wrong in making the assignment. To her friend, the Rev. Dr. Magic, she expressed serious doubts whether she had done right about it. To another she said she had done wrong; she had previously assigned her property to her nephews, and how could she assign it to Thorn. Admitting this evidence of conduct and declaration subsequent to the assignment to be competent as showing the state of her mind, it does not show that she felt that she was deprived of her just rights, that she was defrauded in the transaction, that she was deceived by false representations, or that she had received too small a consideration; on the contrary, the burden of the evidence clearly is, that the question in her mind

was not a question of pecuniary value, but of principle. It was not whether she had been defrauded, but whether she herself had done what was right. Her nephews importuned her for this property, and exacted promises from her not to convey it to others; some of her friends and neighbors, very naturally, advised her to the same course. After the assignment had been made, the claims of her relatives were pressed upon her, and she was reminded of the promises she had made.

On the other hand, it is obvious that she regarded the property as justly belonging, not to herself, but to Mrs. Thorn and her children. Colonel Thorn, it appears in evidence, urged her to make the assignment to himself. She was probably aware that conveying to him, for whom she had no affection, would not secure it effectually to Mrs. Thorn and her children, whom she regarded as the rightful owners. These circumstances satisfactorily account for her agitation and excitement upon the subject; for her hesitation as to the course she should adopt; for her doubts and regrets after it had been adopted. They satisfactorily account for all the vacillation and apparent inconsistency of her conduct.

On the 15th of June, 1832, Miss Hait made and published her will. The assignment of her interest in this residuary estate had not then been made. Thorn and his family were in Europe. The suits in regard to the estate were pending in New York. She had been solicited by both parties to unite in those suits. She must have been fully aware of the nature, if not of the extent, of her interest in this property. Yet she makes not the most remote allusion to it in her will. She leaves her real estate to her three nephews, Jonathan Edwards, William, and Benjamin Hoyt; and after several small bequests to religious and charitable objects, and to her friends, she bequeaths the residue of her estate, if any, to her three nephews.

Elizabeth Hait (so far as appears in evidence) never claimed this residuary estate as her own. She never demanded it. She refused to unite with the rest of the claim-



ants in an action for its recovery. She declared that it was not theirs, nor hers, but the rightful inheritance of Mrs. Thorn and her children. She refused to receive for herself one farthing's consideration for the transfer. The money paid, she declared repeatedly, was not for herself, but for her nephews. It was so described on the face of the obligation. They, in fact, received the whole of it. She utterly ignored the existence of the claim in her will. She did no act indicating the least claim of right to the estate, except the mere act of transferring it from her control.

Nor can it be maintained that this was the result either of imbecility or ignorance of her rights; on the contrary, the fair conclusion from the evidence is, that her judgment was influenced by a knowledge of the wishes of her relative, William Jauncey, and by a strong conscientious sense of duty.

Elizabeth Hait was not imbecile. The bill does not place the case upon that ground. The decided weight of the evidence is against it. Some of the witnesses do indeed express that opinion, but the reasons for their opinions are, in many instances, far from satisfactory: and in regard to a number of them, their testimony applies to a period long subsequent to the date of the assignment. It is not designed to review the evidence in detail, though it has been examined with much care. The result of the testimony on the question of capacity, is very fairly stated by several of the most intelligent witnesses on the part of the complainant.

Dr. Waldo Brown was her near neighbor, and family physician for twenty years previous to her death, and was on terms of friendly intimacy with her. He says, "I think she was on a par with women in general, not deficient, or remarkable."

The Rev. David Magie, who was long and intimately acquainted with Miss Hait, and whose high character, both for judgment and integrity, entitles his opinions to the highest degree of confidence, testifies: "I always supposed she had an average share of intellect; I think her mind was practical. In 1833, I think her mind was as sound as it ever was.

I consider that her judgment at this time, and later, was as good about matters with which she was conversant, as that of persons in her situation usually are." These witnesses were both called by the complainant. Their opinion, sustained as it is by the weight of evidence in the cause, is decisive upon the question of capacity.

All the evidence agrees that Miss Hait was a truly religious woman, of high principle, and strictly conscientious. Considering her situation and circumstances in life, it will be difficult to maintain that her views in regard to this property were not alike conscientious and wise. She lived in retirement in the country. Her habits of life were simple. Her means were fully adequate to all her wants. A considerable portion of her income was devoted to religious and charitable purposes. She had no near relatives dependent upon her. There was no one having a peculiar claim upon her bounty when she died. These considerations show that she may have acted wisely in refusing to enforce her legal claim to this property, as against those to whom she regarded it as justly belonging.

In the light of this testimony, it is impossible to regard the assignment from Miss Hait to Colonel Thorn as a bargain and sale for value. The whole evidence impresses upon the transaction a different character. It is obvious that Miss Hait did not regard it in that light. Her conduct was uninfluenced by considerations growing out of the value of the estate. There was, therefore, no occasion or motive for the practice of the fraud charged in the complainant's bill, and there is no room for the application of the principles of equity relative to constructive frauds.

The case presented by the evidence is simply this. Elizabeth Hait, whose title to this property is sought to be established, never claimed this property as her own. She alleged it to be justly the property of others. She refused to unite in a suit for its recovery. She refused to receive for herself any price for its transfer. She refused to assign it to her relatives while living, or to bequeath it to them by her will. She assigned it to Colonel Thorn without a fur-



thing's consideration paid to herself, with full knowledge of her rights; she acquiesced in that assignment during the remainder of her life, without questioning its validity, or claiming that she had been defrauded in the transaction. And now, after a lapse of twenty years, this court is asked to set aside that assignment as a fraud upon Miss Hait, and restore the property to her relatives.

There is no principle upon which, under such circumstances, a court of equity can or ought to interfere. Miss Hait, having capacity to act for herself, disposed of the property as she deemed right. That disposition she never sought to disturb. This court ought not to disturb it at the instance of others.

The allegations of the bill in regard to the existence of fraud, actual or constructive, are not sustained, and upon this ground the bill ought to be dismissed.

So far as the decision of this case is concerned, it is perhaps unnecessary to express any opinion upon the remaining issues made by the pleadings. But to guard against any misconception of the views of the court, and that the parties may have the benefit of an opinion upon all the points in controversy, the remaining questions will be disposed of. Without discussing the principles involved, the grounds of the opinion will be briefly stated.

Third. The defendants are called upon to account for moneys, which the complainant claims to be due from the estate of William Jauncey to the estate of Elizabeth Hait. The bill seeks to recover not moneys in the hands of the executor, but moneys which have been paid over by the executor to Herman Thorn, or which have been received by Herman Thorn with the executor's consent. In brief, the object of the bill is to recover money to which the complainant is entitled, and which the executor of William Jauncey has unlawfully and wrongfully paid to Herman Thorn.

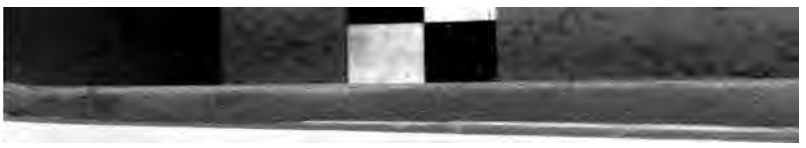
These moneys, it clearly appears, were all paid over by the executor to Thorn, or were permitted by the executor to be received by him, under a final decree of the court of chancery of the state of New York. That decree was made

in two causes pending in that court, upon bills filed to settle the title to the very property in question in this case. To those bills, the complainant and defendants in this cause, or those whom they represent, were all parties.

Of the subject matter of those suits, it is admitted that the court of chancery of the state of New York had full jurisdiction. And the decree of that court is final and conclusive upon the rights of the parties, here as well as there, unless it can be shown affirmatively by the complainant either that the decree was obtained by fraud, or that the court had no jurisdiction over the person of Elizabeth Hait. The other parties were properly before the court.

The question is not whether the instrument upon which the decree may have been founded was fraudulent, but whether the decree itself was procured by fraudulent means. This court will not look back of the decree of another court to inquire into the merits of the case, if there was no fraud in the procurement of the decree. Nor is it at all material to the present inquiry, whether the decree was obtained by consent, or by a decision of the court upon the points in controversy. The conclusiveness of a judgment upon the rights of parties does in nowise depend upon its form, or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or upon confession is, in its nature, just as conclusive upon the rights of the parties before the court, as a judgment upon demurrer or verdict.

So far as regards the conclusive effect of the decree of the court of chancery of New York, the whole inquiry is whether Elizabeth Hait was properly before that court or not. Upon the record it appears that she was. She appeared by her solicitor. He consented to the decree. The decree is valid upon its face. To avoid its conclusive operation, the complainant must show that the solicitor had no authority to appear for her. The presumption is in favor of his authority. It was anciently held that the party was concluded by an appearance, though entered without authority, and could not be relived against it even in the court in



which the judgment was entered. The modern rule is otherwise, but all the cases agree, that the want of authority must be shewn. 1 *Keble*, 89; 1 *Stran.* 693; *Denton v. Noyes*, 6 *J. R.*, 296; *Den v. Hendrickson*, 3 *Green*, 102; *McKelway ads. Jones*, 2 *Harr*, 245. Nor is it a material point of inquiry whether the solicitor exceeded his authority, or departed from the instructions of his client. If he was the solicitor, the party was in court, and the decree is binding.

There is no evidence whatever in the cause that George W. Strong, the solicitor, by whom the appearances were entered and consent to the decree given in the name of Elizabeth Hait, appeared without due authority; on the contrary, the evidence is very explicit that the written authority for the solicitor to appear in both the suits were presented to Miss Hait for signature by Mr. Griffin. They were read over to her. She read them carefully herself. Their contents and the object for which they were intended were fully explained. She signed them in the presence of Mr. Griffin, and he became the subscribing witness. This evidence is uncontradicted. Miss Hait was not only a party to the suits with full knowledge of their existence, but regularly appeared by her solicitor duly authorized; she is, therefore, concluded by the decree.

In regard to the estate of John Rutherford, the case is, if possible, still stronger against the complainant. He refused to take the responsibility of paying any part of this residuary estate, until the rights of the parties should be established by a competent legal tribunal. Suits were commenced against him by both the claimants. He appeared to both suits, and submitted himself to the decision of the court. He paid over the money only under the order and direction of the court. The court had jurisdiction. The decree was perfectly regular. The necessary parties were all before the court. There is not the least reason to believe that he suspected any fraud, or that he participated in it. As to him and his estate, the decree would be a full protection, even though the appearance of Miss Hait were

entered without her authority. Had a bill of equity been filed in the name of Miss Hait, for the recovery of the property, a decree obtained, and the money been paid over by the executor in obedience to the decree, the executor would be protected though the action of the solicitor were unauthorized.

It is material to observe that the object of this bill is not to enforce the decree of the court of chancery of New York against a citizen of this state. That might present the question in a different aspect. The decree of that court has been fully executed. The money was paid over by the executor in obedience to it. The effort now is to hold the executor and his estate responsible, in the absence of all fraud on his part, for complying in good faith with the decree of a court whose behests he was bound to obey. That decree still stands unreversed and in full force. To make a decree in this court not only in direct contravention of that decree, but holding the executor and his estate liable for his obeying it, would be an alarming novelty in the administration of justice, and alike unsupported by equity or precedent.

Fourth. In the absence of satisfactory proof of the imbecility or mental incapacity of Elizabeth Hait, lapse of time is also a fatal objection in equity to the relief sought by the complainant's bill.

The assignment alleged to be fraudulent was executed on the 27th of March, 1833. Elizabeth Hait died on the 9th of March, 1845. The original bill in the cause was filed on the 4th of March, 1847, fourteen years after the commission of the alleged fraud. A part of this delay is accounted for. But for a large portion of this period Elizabeth Hait was in life, and in the possession of her mental faculties. That she chose to acquiesce in the alleged wrong, rather than incur the vexation and hazard of litigation, is no answer to the objection. There must be reasonable diligence to call into action the powers of a court of equity. The delay may occasion a greater wrong to the defendant than could be occasioned by the alleged fraud. It was held by the



court of appeals, in *Doughty v. Doughty*, 3 *Halsted, C. R.*, 650, that it is not reasonable diligence for the party, when there is no disability and no impediment to the vindication of his rights, to lie passive for twelve years, and to call on a court of equity for aid, when the lapse of time and his own laches may have deprived his adversary of the means of defence.

The fact has already been adverted to, that the subscribing witness to the assignment has long been dead, and that a large portion of the evidence in support of the charge of fraud rests upon the testimony of witnesses who detail from memory conversations held, and expressions used, more than eighteen years before, and that, too, in regard to matters in which the witnesses had no particular interest, and to which, so far as appears, their attention was not specially directed. No circumstance could more strongly illustrate the wisdom of the principle of equity that stale claims are not favored.

The general rule in equity (as well as at law) is that persons sueing *in autre droit* are not responsible for costs. An executor or administrator, complainant in equity, will not be ordered to pay costs unless the suit be clearly groundless or vexatious. *Exec'rs of Getman v. Beardsley*, 2 *J. C. R.*, 274; *Goodrich v. Pendleton*, 3 *J. C. R.*, 520. Costs in this case ought not to be allowed.

I do therefore most respectfully advise his Honor, the chancellor, that the complainant's bill be dismissed, without costs.

HENRY W. GREEN.

January 24th, 1854.

Asa Whitehead, W. L. Dayton, and *G. Wood*, of N. Y., for appellants.

P. D. Vroom, W. Pennington, and *Chas. Connor*, of N. Y., for defendants.

The opinion of the court of appeals, affirming the decree of the court below, was delivered by

POTTS, J. Elizabeth Hait's administrator filed his bill in

chancery against the defendants to recover a distributive share of an alleged residue of the personal estate of William Jauncey, deceased. The defendant, Thorn, answered the bill, (1,) denying that there was any residue of said estate undisposed of by the will of Jauncey; (2,) setting up that if there was such residue Elizabeth Hait had made, executed, and delivered to Thorn, in her lifetime, a legal, valid, and operative assignment of all her interest in it; (3,) that said interest, so assigned, had been paid over to Thorn, under and by virtue of a decree of the court of chancery in New York, which decree remained in full force, and was final and conclusive between the parties; and (4,) that the complainant's claim was barred by the statute of limitations.

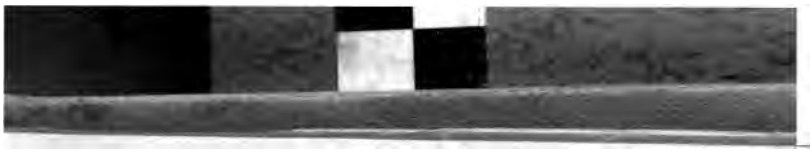
A replication was put in, a number of exhibits made, a large amount of testimony taken; and after hearing, the court of chancery decreed:

First. That the bequest of the residuary estate in the will of William Jauncey, conveyed to the legatee, not a *vested*, but a *contingent* interest only; that his attaining the age of twenty-one was a condition precedent to the vesting of the legacy; that by the death of the legatee before twenty-one, the legacy lapsed, and as to that portion of his estate William Jauncey, the testator, died intestate, and consequently that Elizabeth Hait, the complainant's intestate, was entitled to a distributive share of the residue as one of the next of kin of the testator.

Second. That the assignment from Elizabeth Hait to Herman Thorn, the defendant, was not a case of bargain and sale for value, but was made upon other than pecuniary considerations; was not obtained by fraud or imposition on the part of Thorn; nor was Elizabeth Hait of imbecile mind; but that the same was a legal and binding conveyance in law and equity.

Third. That the decree in chancery in New York set up by Thorn in bar, is final and conclusive upon the rights of the parties here as well as there.

Fourth. That the lapse of time in this case is a fatal



objection in equity to the relief sought by the bill; and that the complainant's bill be dismissed without costs.

The complainant appeals upon the three last points—and the defendant, Thorn, by his counsel insists, that the court below erred upon the first point.

1. The first question, therefore, to be considered, is the construction of the bequest of the *residue*, in the will of William Jauncey.

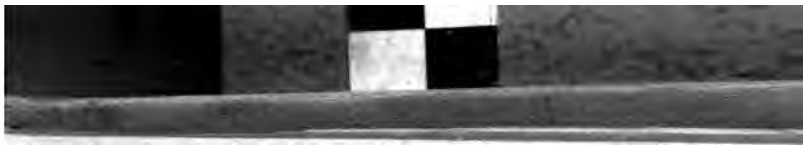
William Jauncey, the testator, was a gentleman of large wealth, residing in New York. He had survived his brother John and his sister Mary, and inherited their property. Mrs. Thorn was an illigitimate daughter of John. Her father died in her infancy, commending his child to the care of his brother William, but leaving no will. She was adopted as a niece by William, and brought up by him; married Mr. Thorn in 1810, contrary to the wishes of her uncle, and though her uncle never became reconciled to her husband, at least up to the time of making his will, yet she and her family lived in the same house with him to the time of his decease. She had several children before Mr. Jauncey's death. Jauncey had no relations nearer than first cousins, of whom *Elizabeth Hait* was one. *These cousins*, (Mrs. Thorn being an illigitimate child,) *were his next of kin*. His will is dated May 28, 1825. He died September 19, 1828. Mary Rutherford, who is made a defendant, is the executrix of John Rutherford, deceased, who was the surviving executor of William Jauncey.

Jauncey, by his will, gave all his estate, real and personal, to his executors, "for the uses and purposes thereinafter mentioned. that is to say, to receive rents, dividends, payments on exchequer bills and renew the same, but not to sell his property in New York, or any part thereof, or to transfer his stocks, or any part thereof, until the period or periods thereinafter mentioned for the performance of the matters therein directed to be done." He directed the trustees "to pay to his niece, Mrs. Thorn, for life, to her separate use, £2000 sterling annually, and for the maintainance and education of her children, till the youngest should

attain full age, £500 sterling annually." He gave a house and lot to Mrs. Thorn for life, with remainder in fee to her daughter Angelina, if living, if not, to her son James, if living, if not, then to her other children. He gave certain parcels of real estate in fee to William Jauncey Thorn, her eldest son, and certain other parcels in fee to her son James Jauncey Thorn, adding to each devise "that the rents of the property be received by the trustees for the general purposes mentioned in this will until the devisees shall *arrive at the years of twenty-one.*" He bequeathed other legacies to four younger children of Mrs. Thorn, "*when he (or she) arrives at the years of twenty-one.*" And to each of the other children, "on his or her arriving at the years of twenty-one," £5000 sterling. He gave to Mary Hait and *Elizabeth Hait* £300, N. Y. currency, annually, for life. He gave his furniture, plate, horses, carriages, cash in his house and in bank, &c., to Mrs. Thorn, to have possession immediately on his decease, and gave her all his bonds. Then follows the residuary clause, out of which this controversy originates, to wit:

"I give and bequeath all the residue and remainder of my property, both in England and America, of every kind and description whatever, to the said William Jauncey Thorn, *when he arrives at the age of twenty-one years*, to him and his heirs forever."

He subsequently says, "It is my most particular desire and injunction, that the said William Jauncey Thorn should, after my decease, *designate himself William Jauncey*, without any additional name." The same as to James, with a request that an *act of the legislature* might be applied for to make it regular. He restrains his executors from collecting any notes or obligations held by him against Rev. Benjamin Hait, and declares them void. Gives £5000 to each of the future children of Mrs. Thorn—appoints William Jauncey Thorn and James Jauncey Thorn trustees of these last legacies, when they are both arrived at the years of twenty-one; and makes other provisions not necessary to notice.



William Jauncey Thorn, whose name was changed by an act of the legislature of New York to William Jauncey, *died before he arrived at the age of twenty-one.* The question is, was the residuary bequest a vested or a contingent legacy; that is, did it vest absolutely in William in his life time; or was it merely a bequest to him upon the contingency of his arriving at twenty-one? If the former, his personal representatives take it—if the latter, it goes to the heirs at law of the testator, of whom Elizabeth Hait is one.

In construing wills, the primary rule is that the *intention* of the testator is to govern; and to ascertain this intention, we are to look first to the language used by the testator himself, and if this is ambiguous, or susceptible of different constructions, or if carried out would defeat the intention as clearly deducible from other parts, or from the whole scope of the instrument, the intention thus manifested will control the particular words.

We look, then, first to the language used by the testator himself to express his intention. The words are, "I give and bequeath, &c., to the said William Jauncey Thorn, *when he arrives at the age of twenty-one years,* to him and his heirs forever."

Now it has been repeatedly held, and seems at this day to be the settled law, that where the bequest made to a legatee is in these, or words of a similar meaning, without being controlled by the context of the will, they imply a condition precedent, to wit: that the legatee live to that age; and consequently the legatee does not take a vested interest in the legacy until twenty-one. I give and bequeath to A. B., "*at* the age of twenty-one"—or, "*if* he arrives at twenty-one"—or, "*provided* he lives to be twenty-one"—or, "*in case* of his arriving at twenty-one"—or, "*when* he arrives at the age of twenty-one"—have all been held to be contingent legacies.

In *Small v. Dee,* 2 *Salk.* 415, the bequest was of one hundred pounds a piece to two children of J. S., *at the end of ten years next after the testator's death.* The legatees died before the expiration of the ten years, and Lord Cowper

held the legacies to be extinct, and said that "whenever the time is annexed to the *legacy*, and *not to the payment of it*, as in this case, if the legatee die before the day of payment, the legacy is lapsed."

In *Onslow v. South*, 1 *Eq. Cas. Ab.* 295, *pl.* 6, the bequest was as follows: "I give to J. S., now under the custody of R. D., two thousand pounds *at the age of twenty-one years*, to be paid by my executors in England." The legatee died under twenty-one, having first bequeathed the legacy to the defendant, South; and it was held by the Lord Chancellor that the legacy did not pass to the defendant, because J. S.'s interest in it was not vested, but contingent.

In *Cruse v. Barley*, 3 *P. Wms.* 20, the testator's bequest was to his eldest son, C. B., two hundred pounds, *at* his age of twenty-one; C. B. died under twenty-one; and the court held that the legacy never vested in him, as the age was annexed to the gift, and not to the payment, and consequently his personal representative could not be entitled to the money.

And so it has been repeatedly held that a legacy given to A. "*if*" he attain the age of twenty-one years, will not vest at an earlier period; and that if the legatee die before twenty-one, the legacy lapses. 1 *Roper on Legacies*, 567.

So, also, where the bequest was to the legatee *provided* he should attain the age of twenty-one, it has been held that until twenty-one the legacy does not vest. *Atkinson v. Turner*, 2 *Atkyns* 41, is a case of this class. There the bequest was of a certain part of a joint stock in trade to the legatee, *provided* he should attain the full age of twenty-one, with remainder over if he did not live to that period; and the legatee having died under twenty-one, the question was whether his administrator was entitled to the profits which accrued between the death of the testator and his own, and which depended on the circumstance whether or not he took a *vested interest* in the legacy during his minority, and the court held that he did not.

In *Young v. Mackintosh*, 13 *Simons* 445, the bequest was of three thousand pounds to Y. for life, and at her death to



be equally divided between her two children, *should they have* attained the age of twenty-one; and this was held to be a legacy *contingent* on the children attaining that age.

So in *Elton v. Elton*, 3 *Atkyns* 504, the bequest was to A. E. *in case* she married with consent, &c. In *Knight v. Knight*, 2 *Sim.* and *Stuart* 490, it was to each of the daughters and sons of T. K. lawfully begotten, *as soon as* they attained the age of twenty-one years; and in both cases it was held that the legacies were contingent.

There is one case in which it is said that the word "*when*" indicates only the intention of the testator to fix the time at which the legatee is to have possession—and is not to be held as interposing a condition precedent to its vesting in him. *May v. Wood*, 3 *Bro. Ch. C.* 471.

But the weight of authority is undoubtedly the other way, and in *Hanson v. Graham*, 6 *Ves.* 239, Sir William Grant, referring to that case, repudiated the doctrine there held, as unsupported by authority.

Going back to the civil law, from whence many of the rules of construction in these cases are derived, we find it laid down that the words "if" and "when" are of the same import when speaking of an uncertain event. Both are words of condition annexed to the very gift of the legacy, when unexplained by the context of the will. *Digest, Book* 36, *Tit.* 2, *Sec.* 22; *Roper and White* 570.

In *Stapleton v. Cheales, Pr. in Ch.* 317, a case long anterior to *May v. Wood*, it was agreed that if a legacy be given to a person *when* he shall attain the age of twenty-one, and the legatee die during minority, the bequest is lapsed, and shall not go to the executors or administrators; and this proposition, Sir William Grant said, in *Hanson v. Graham*, he did not find contradicted by any authority.

In *Goss v. Nelson*, 1 *Burrows* 227, Lord Mansfield said: "In legacies there is a known distinction between the time being annexed to the *substance* of the gift, or to the *payment*. If complete words of gift direct the executor to pay, the other words only fix the time of such payment; and then the legacy vests and is transmissible, though the legatee should

die before the day of payment, as a legacy given "to be *paid* at twenty-one." But if the time is annexed to the *substance* of the gift, as a legacy "*if*" or "*when*" he shall attain twenty-one, it will not vest before that contingency happens."

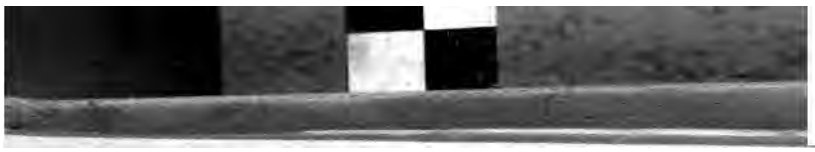
Lord Hardwick recognized this as the rule in *Fonereau v. Fonereau*, 3 *Atkyns* 645. There the bequest was of one thousand pounds to C. F., *when* he should attain the age of twenty-five; but the testator having directed the money to be put at interest, and the interest applied to the education of the legatee, and part of the principal to be expended for his benefit, by way of an apprentice fee, Lord H. held that these *subsequent words* controlled the word *when*, and clearly indicated that the intention was to give a vested legacy.

In *Leake v. Robinson*, 2 *Merivale* 385, the Master of the Rolls, Sir William Grant, said: "If I give to persons of any description *when* they attain twenty-five, or from and after their attaining twenty-five, is it not precisely the same thing as if I gave to *such* of those persons as should attain twenty-five? None but a person who can predicate of himself that he has attained twenty-five, can claim anything under such a gift." And see 1 *Jarman on Wills*, 764; 2 *Williams on Exrs.* 1052; *Ward on Legacies*, 172.

Sheppard's Touchstone, 454, lays down the rule thus: "If one give to W. S. twenty pounds *when* he cometh to twenty-one years of age, or at his age of twenty-one years, and he die before he come to the age of twenty-one years, in this case his executor shall not have the legacy; for the attainment of the age is of the substance of the gift."

The same general rule of construction has been sanctioned in several cases in this country. *Patterson v. Ellis*, 11 *Wend.* 260; *Gregg v. Bethea*, 6 *Porter* (*Alabama*) 9; *King v. Crawford*, 17 *Sergt. and Rawl.* 118; *Moore v. Smith*, 9 *Watts* 403; *Sweet v. Chase*, 2 *Comstock* 80.

There are exceptions to this rule, but I am not able to see that this case is within any of them. Nor can I discover anything in the will which indicates that the testator meant this bequest to be a present, unconditional gift, for it is



clear he did not mean that *payment*, merely, was to be postponed until the legatee arrived at twenty-one; that event was deferred for a much longer time, to wit: until all the other legacies and annuities were paid which were charged upon the estate; and therefore, by the use of the words, I *give* the residue *when* he arrives at twenty-one, he must have intended to refer to the *substance* of the gift, and not the time of payment. It is quite probable that the possibility of the legatee's dying under twenty-one did not occur to the mind of the testator when he made this will. It is quite probable that if it had, he would have made some provision for it. But how is it possible for us to know what that provision would have been. If he did not *think* of it, then he could have had no *intention* respecting it. If he *did* think of it, then he did *not intend* to make any further or other distribution of this residue than he has made. In either case, all that remains for us is to declare the result under the rule of construction applicable to the clause as we find it, and that is that the legacy was contingent, to vest only on condition that William Jauncey Thorn arrived at twenty-one, and as he did not live to that age, the legacy lapsed; as to this residue, the testator died intestate, and his next of kin became entitled to it. So that the ruling of the court of chancery on this branch of the case does not stand in the appellant's way, if he is right upon the points upon which he grounds his appeal.

Second. We come, then, to consider the first error alleged by the appellants in the decree below, which is that the decree *establishes the assignment made by Elizabeth Hait to Thorn in* 1833, whereas they insist the same was fraudulent and void, and ought to have been decreed so to be.

A brief recurrence to the prominent facts which form the history of the case will aid in the examination of this question.

William Jauncey, the testator, died September 19, 1828. Soon afterwards, (in 1829,) the Thorn family went to Europe and resided there until 1845 or 1846, occasionally visiting this country during the time. *William Jauncey* Thorn,

his name having been changed to William Jauncey by an act of the legislature of New York, *died in England, November* 18, 1830, not having arrived at twenty-one; and in February following, James A. Hamilton, of New York, administered on his estate. In July, 1831, five of the first cousins, next of kin to the *testator*, to wit: Eliza Smith, Ann Masters, William S. Chapman, Robert H. Chapman, and Henry Wilkes, filed their bill in chancery in New York, against Herman Thorn, John Rutherford, the testator's executor, Elizabeth Hait, and James A. Hamilton, administrator of William Jauncey, the legatee, to recover their share of the residue of the testator's estate, on the ground that the bequest had lapsed by young Jauncey's decease. Elizabeth Hait refusing to be made a complainant, was made a defendant; and about the same time, Hamilton filed a cross-bill, claiming the residue as the personal representative of young Jauncey, on the ground that the legacy had vested in the deceased in his life time, and did not go to the next of kin. In this state of things, some correspondence took place between Mrs. Thorn and her husband and Miss Hait—the former urging upon Miss Hait the injustice of the claim set up, soliciting her to be guided by Mr. Hamilton's advice, and suggesting the hope that a settlement of these claims might be effected by a compromise. This correspondence extends from August, 1831, to February, 1832. Miss Hait's letters are not in evidence. On the 15th of June, 1832, Miss Hait made her will, in which she does not mention any interest in, or claim to, any part of the estate of Jauncey. On the 8th of December, 1832, she made an assignment of all her interest, as one of the next of kin, in the estate of William Jauncey, (the testator,) saving her own legacy, to her three nephews, William, J. Edwards, and Benjamin Hoyt, with authority to take all lawful measures to recover and retain it to their own use, for the consideration of one dollar and love and affection; but she soon after reclaimed this paper. In 1833, negotiations for a compromise were set on foot between Thorn and the five cousins who filed the bill in chancery, and a compromise was effected by the payment of two



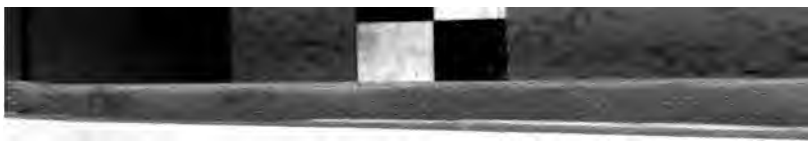
hundred and ten thousand dollars. *On the 27th of March, 1833, Miss Hait assigned all her interest in the estate, saving her legacy, to Mr. Thorn, for one dollar and other good considerations; and authorized Rutherford. the executor, to pay over to Thorn her distributive share;* and at the same time, Mr. Thorn gave her his bond for six thousand dollars, to be paid when the residuary estate should be settled or paid over to him. At the foot of the bond is added—" two thousand for Benjamin, two thousand for William, two thousand for Edwards." The assignment was re-acknowledged May 3, 1833, in the presence of Francis Griffin, who signed it as a witness; and at the same date, the six thousand dollars was paid over to Miss Hait, as appears by her receipt, and she signed a written authority to Thorn, to employ a solicitor to appear for her in the suit in New York, with directions that said solicitor should follow in all respects the lawful directions of said Thorn in relation to said suit. On the 18th of June, 1834, a decree was made in the suit in New York, settling the matters in difference in said suit. On the 9th of March, 1845, Elizabeth Hait died, and this suit was commenced by her administrator, Nov. 14, 1847, to set aside the assignment, &c.

The assignment by Miss Hait, then, was executed in 1833. The allegation is, that she was a woman of weak mind, incapable of transacting business, and easily imposed upon; that the paper was procured by threats and undue influence; was not voluntary; was executed in ignorance of the nature and extent of her rights, and under false representations respecting them; and under a delusion produced and encouraged by Thorn, as to the nature of her claim and the will and intention of Mr. Jauncey, the testator.

I. *As to her competency in* 1833—the evidence is that she was about seventy-five; was a lady of retired habits; after the death of her sister, in 1828, lived very much alone with her hired people; carried on her farm with the aid of a hired farmer; consulted her neighbors frequently about her affairs; usually took good advice, and made a judicious selection of her advisers and assistants; and was careful and

particular in dealing. Witnesses differ in opinion as to the strength of her mental powers, some considering her, after her sister's death, as having become enfeebled in intellect; others that she was as capable as women generally; and others again considering her of excellent mind and sound judgment. She was generally cheerful, but easily excited and distressed; afraid of law and law suits; in matters of business, acting within a very narrow sphere, but capable of transacting that with which she was familiar. There is nothing in the evidence as to her general habits or particular conduct which warrants the belief that she was *imbecile*. She was somewhat eccentric, perhaps; had not much self-reliance or firmness, but she was manifestly under the constant influence of strong religious feeling, and a high sense of moral obligation, and disposed to do what was right; and the distress she at times exhibited about this claim against the Jauncey estate, was manifestly occasioned principally by the apprehension that she might, by an error in judgment, do an act of injustice to others. Her nephews, the Messrs. Hoyts, at whose instance, or for whose benefit this suit was brought, did not believe her *incompetent* to deal with this claim, for *they* took from her an assignment of it, only a few months before she executed this assignment to Thorn; and in all their transactions with her they treated her as competent. It is very clear that this ground of objection to the assignment is not maintained. Then,

II. *Was the assignment to Thorn procured by threats or undue influence?* It is charged in the bill that Mr. Thorn threatened that unless she executed an assignment of this claim he would commence legal proceedings against her and compel her to relinquish it; that she should be taken to New York, and subjected to the consequences and annoyances of a law suit; that his manner and conversation in relation to it were threatening and overbearing, and calculated to intimidate and alarm her; and that she executed the assignment under the influence of these threats. This is expressly denied by the answer. Upon this subject, we have the testimony of Mr. Frazee, Miss Hait's farmer, Mrs. Brown, who

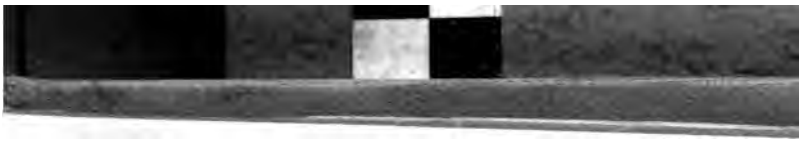


did her house work, and Dr. Brown, who was sent for as a witness. Frazee says Mr. Thorn told her "if she did'nt sign he would have to compel her to go to the city of New York and there be obliged to sign off"—and that this seemed to worry her. Thorn said something about a law suit—that "if she did'nt sign off he would carry it as far as the extent of the law,"—and the dread of a law suit worried her. Mrs. Brown was present. She says Mr. Thorn threatened to take her to New York to compel her to sign off, if she did'nt sign—and this alarmed her. Frazee declined witnessing the paper, and Dr. Brown was sent for and came. Miss Hait said, here is Mr. Thorn with papers; wishes me to sign off my claim to the Jauncey estate; asked Dr. B. what he thought she ought to do; he advised her not to do it, but to wait a day or two. Miss Hait said she thought she had better sign it, as by that means she would get rid of it, and get rid of trouble. She said Mr. Thorn was from a far country, had come to settle it; and she would have to go to New York to sign her name to some instrument, unless a settlement could be had here. Mr. Thorn assented to what Miss Hait said. The Doctor says, "I am not aware that he threatened to take her to New York; he said she would have to go there." This is the substance of the proof of threats. Now it is to be remembered that the claim of Miss Hait was a disputed claim; her right to any part of the Jauncey estate depended upon the construction of the will. It was in litigation in the court of chancery of New York. Miss Hait was a defendant in the bill and cross-bill filed in relation to it. She had as yet taken no step towards asserting her claim in these suits. Thorn was endeavoring to effect a compromise of these suits, no doubt on the best terms he could—and it was perfectly natural and proper for him to tell her that unless she would release her right, the question must be settled in the law suit then pending—and she would have to go to New York to attend to it, and probably this was the amount of what was said. The testimony shows that she was inclined to execute the release, to save further trouble; and was only prevented at the time from doing so by the ad-

vice she received; and although we have not got the testimony of the subscribing witness to the assignment she executed, and do not know what passed at that time, yet we have Griffin's testimony, before whom she re-acknowledged the instrument more than a month afterwards, from which it appears that she then expressed her perfect satisfaction with what she had done, and her wish that Mr. Thorn should have the full benefit of the assignment. Taking the testimony altogether, I think there is no well-founded reason to believe that the assignment was extorted from Miss Hait by threats or undue influence.

III. Another general ground alleged in avoidance of this assignment, is that it was obtained by *fraudulent misrepresentations as to the amount of the property in dispute*, and *as to the validity of her claim to*, and *her equitable right in, it.*

There is evidence that on one occasion, at least, in the course of his interview with Miss Hait, Mr. Thorn said, in the presence of Frazee Haines, the amount of her claim would not exceed seven thousand dollars; and that he also told her, in the presence of Mrs. Brown, that it was not worth a great deal to her. It is also proved that Mr. Hamilton told her, on his first visit to her, it was not much. But there can be, I think, no doubt that Miss Hait either did know, or had abundant means of knowing, that the amount of this residue was very large. Dr. Brown, with whom she was in the habit of advising, says he understood the amount was large. Mr. Rutherford, the executor, who knew all about it, lived where she could reach or communicate with him easily; she did consult with him in relation to the assignment, and he was not the man to conceal anything from her which she had a right to know; her nephews were business men, and doubtless well-informed on the subject. They were in frequent intercourse with her in relation to this very claim. She had been for many years intimate in the Jauncey family, and must have had at least a general knowledge of the extent of the estate—and amid such abundant means of information, it is incredible that she should have remained in ignorance of the fact that the portion of

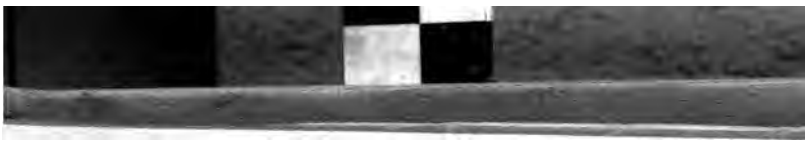


the estate in litigation was very large. It is proved by a number of witnesses that on various occasions, after she had executed the release, she spoke in a manner which showed it was a painful subject of reflection, and that she complained of Mr. Thorn as a pompous man, coming in great state and disturbing the quiet of her retired life; expressed doubts whether she had done right in executing the assignment; said she had been forced to do it; that she had intended it for her nephews; that she was sorry she had done it; that it was an act of injustice, but she was frightened when she did it, and she regretted it, and expressed a dislike for Mr. Thorn; but it does not appear that she ever complained that she had been deceived by any representations made to her in regard to the amount of the property. And Mr. Griffin expressly swears that when he called with Mr. Thorn to take her re-acknowledgment of the paper, she was informed of the terms upon which the other parties had been compromised with; that the estate was spoken of as very large, and that there was no concealment of anything from her. I am not able, therefore, to see that there is any just ground for the belief that the assignment was procured by means of fraudulent representations as to the *value* of the subject with which she was dealing.

Was it procured by *misrepresentations as to her legal or equitable right to the money?* There is no doubt that the Thorns did make efforts to impress Miss Hait with the belief both that her claim was unfounded in law, and was contrary to equity and good conscience. The letters which are in evidence show this—and it abundantly appears that they represented, and caused it to be represented to her, that Mr. Jauncey never intended his next of kin should have the property; that he always meant and intended it for Mrs. Thorn and her children; that if he had not provided for the contingency of the death of William under age, it was an accidental omission; that the claim set up by the next of kin, was unjust, unconscientious, and wicked; and they appealed to the high sense of integrity, and the strong religious feelings of Miss Hait, upon these considerations, to

abandon it on her part. They also represented to her, that if ever the claim was established, it must be by a long and expensive litigation, and they appealed to her instinctive dread of law, and law-suits, and trouble. But admitting all this, was there bad faith or dishonesty or fraud in it? Does it require any extraordinary charity to suppose that the Thorns believed all this? The construction of the will was a fair question for examination, and we have seen that upon just such a question there has been at least some contrariety of opinion in the courts. There was nothing of fraud in frankly saying to Miss Hait that her right would be contested, and strenuously contested. And as to the matter of *intention*, there may be a strong probability the Thorns were right about it so far as this, that if the testator had anticipated the event that occurred, he would have secured, in some way, this residue to the Thorn family. They no doubt honestly believed it was not his mind nor will that it should be wholly diverted from them; and if, without misrepresenting or concealing any facts in relation to the subject within their knowledge, they so persuaded Miss Hait, it can hardly be set up in avoidance of her action founded on that belief. Besides, Miss Hait had the same opportunities of ascertaining what the true construction of the will was, that they had; the other claimants had taken legal advice, had employed eminent counsel, and she might have done so. She knew, too, at least at the time she re-acknowledged the instrument, if Mr. Griffin is correct, that the other claimants had sacrificed two-thirds of their claim to their doubts of final success—and it may be that what to them was a mere question of *expediency*, presented itself to her mind as a question of *conscience*. Upon the whole, I think we cannot say the assignment is void for this.

IV. But then it is insisted here was gross inadequacy—a sale for six thousand dollars, of an interest worth at least fifteen times the amount—a sale for six thousand dollars, when she might have compromised it for forty thousand dollars. Undoubtedly if this transaction is to be considered as a matter of bargain and sale, here is a gross inadequacy



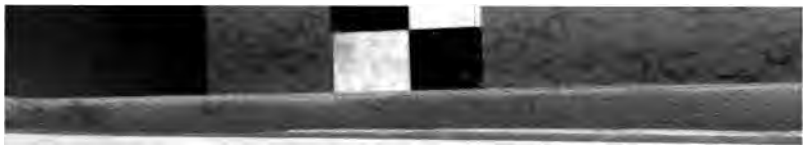
of consideration; such inadequacy as raises a violent presumption of fraud, deception, ignorance, or imbecility. But was it such a transaction? The question turns entirely upon the light in which Miss Hait herself regarded it.

Now it is very manifest that, from first to last, Miss Hait never dealt with this matter as one of *pecuniary interest to herself*. She had enough, and to spare; retired from the world with sufficient for her wants and her charities, she had no desire to accumulate a superabundance of wealth. But she had nephews, and they wanted it. She was attached to Mrs. Thorn, and Mrs. Thorn urged her claim to it. The question which agitated Miss Hait's mind was to which of these parties she should give it. The idea of *selling* her interest, if she had any, in the estate, never seems to have entered her mind; and whatever doubts she may have had as to the justice of her claim, weighed, of course, in favor of Mrs. Thorn. I think it is clear she had doubts about it. Such is the impression the letter of Mrs. Thorn, in answer to Miss Hait's, conveys. Such would seem to be the probable inference deducible from her refusing to be a party to the bill in chancery—independent of the testimony of Griffin. Indeed, if she was free from doubt upon the subject, she was probably the only one of the heirs who was so.

She yielded, however, in the first instance, to the solicitations of her nephews. The assignment to them, upon its face, was a voluntary gift of the whole interest, for "their sole use, benefit, and behoof forever." Having subsequently reconsidered and reclaimed this, she next executed this assignment to Thorn. This also upon its face purports to be a voluntary gift. It is true Mr. Thorn paid her six thousand dollars, but this was, as appears upon the face of the transaction, not a consideration paid to her for her use, but a sum of money stipulated for, in order that she might make it a voluntary gratuity from her to the nephews, to satisfy them. Upon the whole case the fact stands clear of doubt, that the old lady throughout designed this interest of her's as a gift to one or the other of these parties, and that she never purposed to appropriate it to her own use. The two assign-

ments show that this was so; and all the testimony as to her declarations from the date of the last assignment down to the close of her life, confirms it. For she never complained that she had sold the claim for too little; her anxiety, her doubts, and her trouble were about the question whether, having promised to give it to the boys, she had done right in giving it to the Thorns.

Such seems to be the aspect of the case independent of the testimony of Griffin. His position in reference to the cause has been the subject of remark. He was the solicitor of Thorn and Hamilton in the suits in New York. He prepared the defendant's answer in this suit. But his veracity is not impeached. His testimony is important, for he is the attesting witness to the re-acknowledgment of the last assignment. He visited Miss Hait, in company with Mr. Thorn, on the 3d of May, 1833. He says they went first to Belleville to see Mr. Rutherford, and inform him of the assignment having been made by Miss Hait to Mr. Thorn. Rutherford said he had himself conversed with Miss Hait on the subject, *and knew it was in accordance with her views and wishes*. They went to Miss Hait's. She expressed the greatest affection for Mrs. Thorn; said she knew Mr. Jauncey intended that Mrs. Thorn and her family should inherit the estate; that when Chapman proposed to her to unite in the suit in New York, she had refused to have anything to do with it, and was surprised that he, a professing christian, should have anything to do with such a wicked attempt to divert the estate from Mrs. Thorn and her family. She said J. Edwards Hoyt had represented to her that unless she did something, the Chapmans and the *rest would get the whole estate*, and *Mrs. Thorn would get nothing*, and, to obviate this, proposed that Miss Hait should give him her name, and he would litigate the matter at his own expense, and *give Mrs. Thorn one-half*, or give it to Miss Hait for Mrs. Thorn; that upon this representation she executed the assignment to the nephews. That soon after, Mr. Rutherford undeceived her as to this view of the case, upon which she had reclaimed and cancelled that assignment. That she gave her nephews



two hundred dollars a piece to moderate their disappointment; re-acknowledged the assignment to Thorn, received the six thousand dollars, signed the receipt for it; executed an authority to Mr. Thorn to appoint a solicitor for her in the suit in New York, saying it was her wish that he should have the full benefit of the assignment; said she designed the six thousand dollars for her nephews—she wanted nothing for herself, and if Mr. Thorn thought it too much she would take less. And Mr. Griffin further says: "We made use of no misrepresentations or concealment, undue influence nor threats, or no influences you may say; indeed, none such were necessary, if we had been disposed to use them—for Miss Hait appeared to be as anxious, or rather willing, to carry out the arrangement as Mr. Thorn. The whole conversation was based on the idea that in receiving this six thousand dollars, Miss Hait was giving up to Mr. Thorn a large substantial advantage. There was no concealment of any material fact. The conversation was perfectly full and frank on the whole subject."

It is very clear, I think, that the transaction in question cannot be considered as a *sale*. It is rather to be regarded as a voluntary relinquishment to the Thorns of a claim which she considered unconscientious—of an interest which she believed in justice belonged to them.

This assignment was made in 1833, by Miss Hait, at her own house—not without deliberation, for the *subject matter* of it, and what disposition she should make of it, had long been before her mind. She had talked with her neighbors and friends—had been importuned by her nephews—had spoken with Mr. Rutherford, the executor—and had had previous conferences with Thorn, and correspondence with Mrs. Thorn, in relation to it. The friends who were about her seem generally to have advised her against the assignment. Thorn was not in a situation to exercise any peculiar influence over her, for he does not seem, personally, to have had her confidence or favor. She persisted in executing the paper against Dr. Brown's advice, and sent for another neighbor to witness it when he refused. More than a month

afterwards, and after she had seen and advised with Mr. Rutherford, she voluntarily re-acknowledged the instrument —received and receipted for the six thousand dollars, and subsequently gave it to her nephews, who accepted it. She lived about twelve years after the transaction, always treated it as a thing *settled*, and never intimated the slightest disposition to disturb that settlement. She had an undoubted right to do as she pleased with this claim. She exercised that right, and I see no reason for interfering with it now.

Being of opinion, therefore, that this assignment is good and valid, and ought not to be set aside, the decree of the court below should, in my judgment, be affirmed; and, having reached that conclusion, I do not deem it necessary to examine the other questions made in the cause.

VALENTINE, J. The bill in this case was filed by the administrator of Elizabeth Hait to recover a distributive share of the residue of the personal estate of William Jauncey, deceased, to which it is alleged that the said Elizabeth Hait became entitled as one of the next of kin of the said William Jauncey.

The material issues made by the defendant's answer are:

First. That all the personal estate of William Jauncey was disposed of, in and by his last will and testament, and that no part thereof did or could vest in the said Elizabeth Hait as his next of kin.

Second. That all the right and interest to which the said Elizabeth Hait had or could have in the residue of the estate of William Jauncey, was assigned by her to Herman Thorn, one of the defendants.

Third. That the share and interest of the said Elizabeth Hait was paid by the surviving executor of the said William Jauncey to Herman Thorn, under and by virtue of a decree of the court of chancery of the state of New York; that the said decree remains in full force, and is final and conclusive between the parties.

Fourth. That the claim of the complainant is barred by the statute of limitations, more than six years having



elapsed from the time of the payment of the legacy by John Rutherford, the surviving executor of William Jauncey, deceased, before the filing of the bill in this cause.

William Jauncey, of the city of New York, died on the 19th of September, 1828. At the time of his death he was seized and possessed of a large and valuable estate, both real and personal, in England and America. By his will, executed and published in due form of law, having given and devised large portions of his real and personal estate, the testator further gave and bequeathed as follows: "I give and bequeath all the residue and remainder of my property, both in England and America, of every kind and description whatsoever, to the said William Jauncey Thorn, when he arrives at the age of twenty-one years, to him and his heirs forever."

The legatee, William Jauncey Thorn, (having, in compliance with a request of the testator, assumed the name of William Jauncey,) died before he arrived at the age of twenty-one years.

Whether, by the terms of the will, the residuary legacy vested, upon the death of the testator, in the legatee, or whether the legacy was contingent upon the legatee's attaining the age of twenty-one years, and by his death before that period elapsed, is one of the questions submitted for consideration.

The rule is well settled, that when the time specified in the bequest is annexed to the payment only, the legacy vests immediately on the death of the testator, the time of payment is only postponed; but when the time is annexed to the gift itself, as when the legacy is given to the legatee at twenty-one, the legacy does not vest until he attains that age; the legacy is given upon that condition, and if the condition be not fulfilled, the legacy never vests.

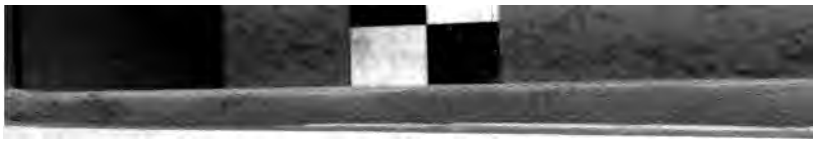
William Jauncey, the legatee, having died before he attained the age of twenty-one years, the legacy lapsed, and never vested in him, and upon his death the residuary personal estate became and remained undisposed of, and thenceforth was held by the executors of the said testator in trust

for his next of kin, and the said Elizabeth Hait thereupon became and was entitled to one-sixth part thereof, she being one of six of his next of kin in equal degree to the said testator.

This leads to the second inquiry, viz: Whether the assignment made by Elizabeth Hait to Herman Thorn of her interest in the residuary estate of William Jauncey was valid, or procured through fraud or undue influences.

The bill charges (among other things) that at the time of the execution of the assignment, the amount and nature of Elizabeth Hait's interest in the estate was not made known to her; that she was told her interest was not worth over $5000 or $6000; that it was concealed from her what amount was given to the other next of kin for their interest in the estate; and that she was intimidated by threats from the said Herman Thorn that he would compel her to go to New York to attend a lawsuit and sign off.

The assignment bears date the 27th of March, 1833, and purports to have been executed in the presence of Mathias Brant as subscribing witness; the subscribing witness is dead. It is proved that he was a neighbor of Miss Hait, and on friendly terms with her. The deed of assignment purports to have been re-acknowledged on the 3d of May, 1833, in the presence of Francis Griffin; he has been examined as a witness in this cause. He states that he was a solicitor of Colonel Thorn in two suits pending in the court of chancery of New York, in relation to this residuary estate; that on the 3d of May, 1833, he accompanied Colonel Thorn to Miss Haits; that the original deed of assignment was then produced by Colonel Herman Thorn, and was re-acknowledged by Elizabeth Hait, at the same time she produced a bond for six thousand dollars, given her by Colonel Thorn, and bearing even date with the assignment, and executed in the presence of Mathias Brant as subscribing witness; the bond was paid by Colonel Thorn, and the amount was endorsed upon the assignment, and signed by Elizabeth Hait in the presence of the witness; and Miss Hait at the same time executed two other papers, authorizing solicitors



to appear for her in the two suits pending in New York, in each of which she is made party defendant. The papers were read over to her, and the contents explained; she read them herself; said she was nervous about signing papers; that she was not accustomed to it; and that when she executed the assignment to Thorn she had hoped the matter was at an end, and that she would have no more papers to sign; but if it was necessary she would sign them, and did sign them in the presence of witness.

Mr. Griffin further testifies, that Miss Hait appeared to be a woman of good common sense, and understood what she was about; and that concealment, misrepresentations, or threats of any kind, were not made use of towards her; that she seemed perfectly willing to carry out the agreement.

A compromise had been, at that time, agreed on between Herman Thorn and five of the next of kin of William Jauncey, by which Colonel Thorn had agreed to pay them two hundred and ten thousand dollars for their interest, being at the rate of forty thousand dollars for each share, and ten thousand dollars for law expenses. This whole compromise and the terms of it were told to Miss Hait, and was the subject of conversation. The whole conversation was based on the idea that in *receiving the six thousand dollars* she was giving up to Colonel Thorn a large amount of property. The witness also states, that his memory was refreshed by a written memorandum of what passed, made on the evening of the same day, after he returned to New York.

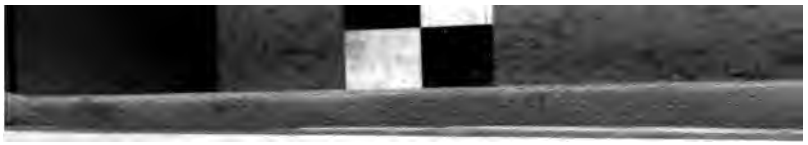
In the fore-part of Mr. Griffin's testimony, he says that Mr. Thorn stated to Mr. Rutherford that he had got from Miss Hait a release and assignment in his favor of all her interest in the residuary estate of William Jauncey, the elder, and had agreed to pay her a consideration therefor of six thousand dollars.

He further says, the estate was spoken of by Mr. Thorn and myself as being very large; no precise figures were named, because at the time I myself did not know the figures, nor as far as I know did Mr. Thorn know them.

Frasee Hains testifies, that he lived with Miss Hait seven years—from the year 1827 to the year 1834—that he saw Herman Thorn at Miss Hait's three times in the year 1833; he came there the latter part of one week, and was there the next; the next week he was there twice—at one time he staid two nights.

Before Mr. Thorn came, Mr. Hamilton had been there to see Miss Hait; he had been to see Miss Hait twice, I think, about six weeks before Mr. Thorn came; Mr. Hamilton's visits were about one week apart,—he came there to settle up the estate of Mr. Jauncey. I believe Mr. Hamilton was a lawyer from New York. He came to see Miss Hait at Mr. Thorn's request. He wanted her to sign off her right to the property of the Jauncey estate. On the first visit he told her she had no right, but the next time he came he found she had a right, and then it was he wanted her to sign off her right. The second time Colonel Thorn came, he wanted her to sign off; she was not willing to sign off this property. She asked him how much property there was. He said there was between six and seven thousand dollars—would not exceed seven. She refused to sign off. When Colonel Thorn came the third time, he was on the same errand; I think he staid two nights; he and Miss Hait talked a good deal about signing papers. At first she refused. He told her if she did not sign off, he would have to compel her to go to New York and there be obliged to sign off. He said something about a lawsuit, which seemed to worry her a good deal; the dread of a lawsuit seemed to worry her. She said if she had to do it, she might as well do it there as to go to New York. He said if she would sign off he would give her six thousand dollars to sign off.

The testimony of Mr. Griffin is certainly open to comment, and requires strict scrutiny, on the ground that he was the paid attorney of Colonel Thorn, and went with him to the residence of Miss Hait in that capacity, and for the express purpose of becoming a witness to the transaction; he states that in the evening of the same day of their visit to Miss Hait, after he returned to the city of New York, he made a



memorandum in writing what Miss Hait said on that occasion, and of her admissions, but says he did not write down very fully what he and Colonel Thorn said preceding those admissions; had he been as careful to preserve their words, his memorandum probably would have put that interview in a very different aspect. The bill charges that he aided and participated in the fraud. Mr. Griffin's testimony may, with propriety, be construed strongly against Herman Thorn; and he says that on their way to Miss Hait's they called on Mr. Rutherford, *and Colonel Thorn told Mr. Rutherford that he had got from Miss Hait a release and an assignment in his favor of all her interest in the residuary estate of William Jauncey, the elder, and that he had agreed to pay her as a consideration therefor, six thousand dollars.* Mr. Griffin further states he accompanied Colonel Thorn to Miss Hait's, to witness the payment of the money; and the conversation was based upon the idea that for this six thousand dollars Miss Hait gave up a large amount of property; which is a very indefinite term; speaking to a person of Miss Hait's capacity and business transactions through life, six thousand dollars would appear to be a large amount; and Mr. Griffin says no particular amount was named, as he did not know the figures.

Frasee Hains, a witness on part of the complainant, testifies that Colonel Thorn offered Miss Hait six thousand dollars for her interest in the Jauncey estate, but she refused to accept that sum. Herman Thorn told her the extent of her interest would not exceed seven thousand dollars, and Colonel Thorn staid at her house two days, importuning Miss Hait, and never left her house until he procured the transfer and assignment of her interest for the consideration of six thousand dollars.

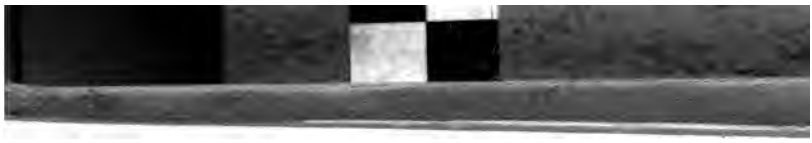
A large mass of testimony has been adduced by Colonel Thorn to prove the transfer was voluntary, and not for a consideration; the transfer and assignment purport to be for the sum of one dollar, and for divers other good causes and considerations. What other considerations? Not for love and affections surely. For by the testimony of the Rev. Dr.

Magie, Miss Hait always spoke of the visits of Colonel Thorn as being exceedingly unpleasant to her; she would be much agitated when referring to his visits; she regarded him as a pompous man; and she frequently and strongly spoke of him as an intruder into the family.

Dr. Waldo Brown, her near neighbor, refused to be a witness to the transaction, which goes to show what he thought of the transaction at the time; had it been a voluntary surrender or assignment, most assuredly he would not have refused his signature to the paper.

Colonel Thorn was a man possessing a large fortune, and being assisted in this transaction by two eminent attorneys from the city of New York, they all very well knew that the consideration of six thousand dollars was too insignificant a sum for the transfer of property to the value of one hundred and fifty thousand dollars, or upwards, which accounts for the consideration mentioned in the transfer to be for *one dollar and divers other good causes and considerations*, and at the same time Herman Thorn gives his obligation to Elizabeth Hait *for six thousand dollars*.

Regarding the assignment from Elizabeth Hait to Herman Thorn as a matter of bargain and sale, there is much in the evidence tending to support the charge of undue influence, concealment, and fraud, which entitles the complainant to relief in a court of equity. The parties did not stand upon equal ground: Colonel Thorn was a man of business qualifications, in the prime of life, and knew well the value of the property he was contracting for. Miss Elizabeth Hait was a female, over the age of seventy years, of retired habits and excitable disposition, easily thrown off her guard, and entirely incompetent to transact business of such magnitude. The contract was entered into by her without the advice of counsel, or the presence of a friend, against the wishes of her relatives, and contrary to the advice of her neighbors; while Colonel Thorn, in addition to his superior business qualifications, had the advice and assistance of two eminent attorneys (Mr. Hamilton and Griffin) from the city of New York. Mr. Hamilton first paid two visits to Miss Hait.



Then followed three visits from Col. Thorn, at one of which he staid two nights. She complained to Frasee Hains that she could not sleep in consequence of the annoyance of Colonel Thorn. He did not leave her house until he procured the assignment.

Taking, then, the true consideration of the transfer and assignment to be six thousand dollars, it was grossly inadequate; it bore no relation whatever to the value of the property transferred. These circumstances alone, aside from any evidence of actual fraud, are of such a nature as to call for the aid of a court of equity; they afford sufficient ground upon which the court may interfere to relieve against such unfair and unconscionable contracts.

I am clearly of the opinion the said transfer and assignment, dated the twenty-seventh March, 1833, was obtained by Herman Thorn from Elizabeth Hait, by undue influence, and through ignorance on her part of the character, extent and value of her rights in the said residuary estate; and was, and is, fraudulent as against the said Elizabeth Hait, and the appellant as her representative; and that the re-acknowledgment of the said transfer and assignment, and the several authorities to substitute and appoint solicitors in the two suits in the court of chancery of New York, in the pleadings and proofs mentioned, were obtained from her by the said Herman Thorn, in furtherance of the original assignment, without removing the impositions and undue influence, and while she was laboring under the ignorance of her rights, and of her right to have the assignment opened in a court of equity, and do not ratify her transfer and assignment.

The orders and decrees in the two suits in the court of chancery of New York, on the seventh June, 1833, and the further order and decree made therein, on or about the eighteenth of June, 1834, as mentioned in the pleadings and proofs in this cause, so far as the same affects the said Elizabeth Hait and her rights, were founded upon default suffered, and consent given by solicitors in said suits, appointed by the said Herman Thorn, who appeared and acted therein

under the instructions and directions of Herman Thorn, in pursuance and in furtherance of said fraudulent assignment; and the execution of said decrees, in further fulfilment thereof, were all made and obtained by the said Herman Thorn, while she was laboring under the imposition aforesaid, and under the ignorance of her rights in law; therefore the said decrees are fraudulent as against her and her representative. The principle is well settled, that in order to ratify a transaction originally procured through fraud or undue influence, the imposition must be completely removed and cleared up, and the party apprised of her right in equity to relief against the fraudulent practice. None of this was done in the present case. The decrees of the court of chancery of New York in the said suits have been fully executed, the money paid over in obedience thereto, by John Rutherford, the executor of William Jauncey, and have been received by Herman Thorn, or on his behalf; in the absence of all fraud on the part of said executor in complying with said decree, and without any notice thereof by him, or that the said decrees were not binding on the said Elizabeth Hait; therefore, the said complainant is not entitled to recover of the said Mary Rutherford, executor of said John Rutherford, any part of the assets so paid or transferred by the said John Rutherford, in pursuance of said decrees, nor to open the accounts of the said John Rutherford, but that said decrees and account do stand in full force for the protection of his representatives and of his estate.

The assignment and authorities were procured by Herman Thorn, in this state, and he immediately thereafter left this state, and in a few weeks departed from the United States, and resided in Europe with his family for twelve years and upwards, and was not during that term within this state; therefore her representative is not barred by any limitation of or lapse of time, from recovering against him. The appellant is entitled in equity to recover from Herman Thorn the amount of one-sixth of the said residuary bequest so paid over to him, or permitted by John Rutherford, executor of William Jauncy, to be received by him, the said Thorn, or



on his behalf, and that it be referred to a master to take an account, with accumulations to be charged, and deductions to be made for the six thousand dollars paid as consideration money on said assignment and other equitable allowance, on which final decree is to be rendered, with costs in both suits, in favor of the appellant.

And that the appellant is entitled to the benefit of the mortgage given by Herman Thorn to the said John Rutherford on the premises called Elmwood, (mentioned in the pleadings,) dated the sixth day of June, 1833, for the indemnity of the said John Rutherford in manner therein mentioned and set forth, and to have said mortgage assigned to him for that purpose, and to be prosecuted hereafter under the direction of the court of chancery, in case the said Herman Thorn shall fail to pay the appellant the amount which may or shall be recovered against him under the final decree of the court in this cause.

The decree of the court of chancery was affirmed by the following vote :

For Affirmance.—Justices Ogden, Elmer, Potts, and Haines; Judges Cornelison, Risley, Huyler, and Arrowsmith.

For Reversal.—Judge Valentine.

COURT OF ERRORS AND APPEALS.

JUNE TERM, 1855.

Between THE NEWARK PLANK ROAD AND FERRY COMPANY, DANIEL M. WILSON, EDWARD DOUGHTY, WILLIAM B. GUILD, JAMES H. TICHENOR, DAVID A. HAYES, and DANIEL PRICE, appellants, and L. Q. C. ELMER, Attorney General, at the relation of ISAAC VAN WAGENEN and others, and ISAAC VAN WAGENEN and others, respondents.

By the eighth section of the act incorporating The Newark Plank Road and Ferry Company, the company are authorized to construct a plank road, to commence in the city of Newark, east of Broad street, and thence, passing by the most convenient and direct course, to the bank of the Passaic river, near the old ferry, and across the meadow between the Passaic and Hackensack rivers, and through the county of Hudson, in the most eligible route, to its point of termination in said county and opposite the city of New York; and that it shall be lawful for the said company at any time to drive piles and erect or build piers, wharves, platforms, ferry stairs, or other works necessary for the said road and ferries thereon, in the said Passaic and Hackensack rivers; provided always, that the free and uninterrupted navigation of vessels in said rivers, or either of them, is not thereby prevented by any bridge, or other obstruction, in any manner whatever. The eleventh section provides that the company shall keep and maintain two good and sufficient ferry boats at the respective ferries on each of the said rivers, and shall cause lamps to be put up at the extreme point of each pier at said ferries, which shall be lighted before dark every evening, and kept lighted until daylight next morning. After the company had driven piles and indicated the distance to which they intended to project piers into the river, a bill was filed, praying an injunction restraining the said company from projecting piers, &c., into the Passaic river, and from obstructing the free navigation of said river.

Held, that the act gives the company the right to extend their works beyond the banks of the river: that the language of the proviso assumes that the works



authorized will be an *obstruction* to the river; but provides that no *such obstruction* shall be built or erected as would prevent the free and uninterrupted navigation of vessels in the river.

As the plan of the company, mentioned in the bill and answer, and upon which they were proceeding to construct their works in and over the river, extended into the river to the obstruction of navigation, beyond *what was necessary for the purposes of, and contemplated by the act of incorporation*, an injunction was allowed, restraining the defendant from constructing their works upon that plan.

Held, that if the contemplated plan would occasion an obstruction to the navigation of the river, *beyond what the charter authorized*, the works would be a nuisance.

Every erection in a navigable river, which obstructs or hinders the navigation, is a nuisance.

It is well settled that grants of this nature are to be construed strictly, and not extended beyond what is *reasonably necessary* for the purpose the act contemplates.

The issue made is that the piers were proposed to be built *as the charter authorized*, and would not prevent the free and uninterrupted navigation to any greater extent than was intended by it. The question is as to the meaning of the charter. It is two plain to admit of a reasonable doubt that, independent of the charter, they would constitute a nuisance.

An error of judgment in a matter, far from being apparent, is not such a violation of an explicit order as ought to subject a party to attachment.—*Elmer, J.*

Where the defendants violate an injunction, an attachment will issue against them for contempt. But when it did not appear by the evidence how far the works would require to be altered to conform to the order, nor to what extent the injunction had been violated, the matter was referred to one of the Masters to ascertain and report before the attachment should issue; and an order to abate any part of the works of the defendants was denied.—*Green, C. J.*

A decree which does not dispose of the whole merits of the cause, but leaves important questions for further examination and the future judgment of the court, is not a *final decree* within the meaning of the act, which requires that "all appeals, except from final decrees, shall be made within forty days after filing the order or decree appealed from." *R. S.* 921, § 80.

The bill and information filed in this cause, on the 18th of June, 1851, charges that the defendants, The Newark Plank Road and Ferry Company and others, are engaged, without lawful authority, in contravention of their charter, in the erection of a ferry and piers in the navigable waters of the Passaic river, to the injury and obstruction of navigation. The prayer of the bill is that the defendants may be restrained from carrying into effect the plan devised and determined on for erecting their ferry and piers at and across said river, according to the plan, &c., or from erecting other works whereby the free navigation of the river may

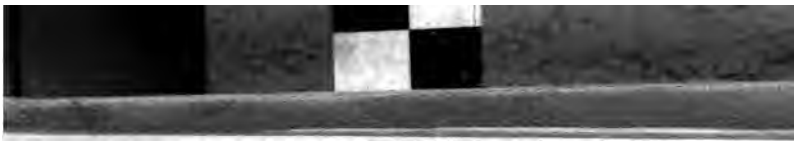
be in anywise obstructed, and from erecting any works other than such as authorized by their charter, and from making any obstructions or erections whatever in said river, where the waters are navigable, and that the nuisances and obstructions already erected be abated.

The defendants, by their answer, admit that they have determined to construct a ferry across the Passaic river, and that they are erecting piers according to a plan particularly set out in the answer, but they deny that the contemplated erections are in violation of the charter of said company, or that they will obstruct navigation in any material manner.

Upon the coming in of the answer, the complainants moved for an injunction, pursuant to the prayer of the bill. The cause was heard before the Chancellor upon the bill, answer, and affidavits of the respective parties.

HALSTED, Chancellor. On the 24th of February, 1849, the legislature of New Jersey passed an act entitled, "An act to incorporate the Newark Plank Road and Ferry Company." By the eighth section of this act, the said company are authorized to survey, lay out, and construct a plank road, to commence in the city of Newark, east of Broad street, and thence passing by the most convenient and direct course to the bank of the Passaic river, near the old ferry, and across the meadow between said Passaic and Hackensack rivers, and through the county of Hudson, in the most eligible route to its point of termination in said county and opposite the city of New York; and the said section further provides, that it shall be lawful for the said company at any time to drive piles and erect or build piers, wharves, platforms, ferry stairs, or other works necessary for the said road and ferries thereon, in the said Passaic and Hackensack rivers; provided always, that the free and uninterrupted navigation of vessels in said rivers or either of them is not thereby prevented by any bridge or other obstruction in said rivers, in any manner whatever.

The eleventh section of the said act provides that the said company shall keep and maintain not less than two good and



sufficient ferry boats, propelled or moved by steam, horse power, or otherwise, for the safe transportation of horses, carriages, passengers, goods, and other commodities, one boat on each of the said rivers, at the respective ferries, and persons capable of managing the said boats; and the said company shall cause to be put a lamp at the extreme point of each pier at said ferries, which said lamps shall be lighted every evening, before dark, and continue lighted until day-light next morning.

The bill prays an injunction restraining the said company from projecting piers, wharves, &c., into the Passaic river, on either side thereof, and from obstructing, by any works at the ferry across the Passaic, the free and uninterrupted navigation of the said river.

The company have already driven piles in the river, on each side thereof, to some distance from the banks; and have thereby indicated the distance to which they intend to project piers into the river. The bill claims that the company have no right to extend piers into the river to the distance so indicated, nor to obstruct the navigation of the river at all, by any works extending beyond its banks.

The act contemplates and provides for a ferry across the river by means of a steamboat, and such a ferry as will be safe for the transportation of horses, carriages, passengers, goods, &c., and provides that the company may drive piles, and erect or build piers, wharves, platforms, or other works necessary for the said ferry. The Passaic river, at low water, leaves margins of earth bare, between its banks and low water mark. This must be presumed to have been known by the legislature, as also must the manner in which steamboats are used for ferries.

I think it clear that the act gives the company the right to extend their works beyond the banks of the river; and that the position taken by the complainant, that any, the least extension beyond the bank, is prohibited by the proviso to the eighth section of the act is not maintainable. The proviso is, not that the river shall not be at all obstructed, but that the free and uninterrupted navigation of vessels

in the river shall not be prevented by any bridge or other obstruction. The language of the proviso assumes that the works authorized will be an obstruction to the river, but provides that no such obstruction shall be built or erected as would prevent the free and uninterrupted navigation of vessels in the river.

I think the true construction of the act is, that the company are authorized by it to build their wharves or piers in the river to such extent only that a ferry boat of suitable dimensions may reach such wharves or piers at low water, and such other works, beyond the ends of the wharves or piers, as may be necessary for safely receiving their ferry boat, and holding it at the ends of the piers for the safe and convenient entering upon and leaving said boat. That it was the intention of the legislature that the river should be ferried, by a steamboat or other boat, as far as fairly practicable.

I am of opinion that the plan of the company, mentioned in the information and bill and in the answer of the defendants, upon which the company propose to construct their wharves, piers, and other works in and over parts of said river, and upon which they were proceeding to construct the same at the time of the filing of the bill and information, extends into the river to the obstruction of the navigation of vessels therein beyond what is necessary for the purposes aforesaid, and beyond what is contemplated by the act of incorporation.

An injunction will, therefore, be allowed, restraining the defendants from constructing their works in and upon the said river upon the plan above mentioned, and from extending their piers or wharves into the said river beyond a point on each side thereof which may be reached by a ferry boat of suitable dimensions at low water.

On the fourth day of August an injunction issued. On the tenth of November notice was given to the defendants of an application to the Chancellor that an attachment issue against the defendants for a contempt in violating said

order. Chancellor Halsted, by whom the injunction was ordered, having retired from office, and Chancellor Williamson, his successor, having been concerned as counsel in the case, the Hon. Henry W. Green, Chief Justice of the Supreme Court, was called to the assistance of the Chancellor. The history of the proceedings in the cause are clearly stated in the opinion.

GREEN, C. J. The bill and information filed in this cause on the eighteenth of June, 1851, charges that the defendants, The Newark Plank Road and Ferry Company, and others, are engaged, without lawful authority, in contravention of their charter, in the erection of a ferry and piers in the navigable waters of the Passaic river, to the injury and obstruction of navigation. The prayer of the bill is that the defendants may be restrained from carrying into effect the plan devised and determined upon for erecting their ferry and piers at and across said river, and from constructing and erecting said piers into and upon said river, according to said plan, as they are engaged in doing, and from driving any piles, or erecting or building any piers, bulkheads, platforms, ferry stairs, or other works, in or upon the said river, whereby the free and uninterrupted navigation of said river may be in any wise obstructed, or the free navigation of said river by vessels, in any manner prevented, and from driving any piles, or building or erecting any piers, platforms or other works in or upon said river, other than such as are authorized by their acts of incorporation, and also from making any obstructions or erections whatsoever in said river, where the waters thereof are navigable; and that the nuisance and obstruction to the navigation of the Passaic river already created by driving piles, thereby may, by the order or decree of this court, be abated.

The defendants, by their answer, admit that they have determined to construct a ferry across the Passaic river, and that they are engaged in erecting piers extending out into the river, according to a plan particularly set out in the answer, but they deny that the contemplated erections are in

violation of the charter of said company, or that they will obstruct or impede the navigation of said river in *any material manner*, or that it will at all prevent the free and uninterrupted navigation of said river, *with ordinary care*.

By the plan specified in the answer, and represented on a drawing thereto annexed, it appears that the river, at the point where the ferry is constructed, is five hundred and eighty-five feet from low water mark on the west side to low water mark on the east side; that the defendants have driven piles for their piers, extending into the river beyond low water mark, about one hundred and ten feet on the west side, and about forty feet on the east side of the river; that said piles are driven in rows parallel to the bank of the river, the rows being twenty feet apart; and that by the plan the defendants propose to extend from the row of piles furthest in the river on the west side, two rows of piles as fenders to the ferry boat, to extend about fifty-seven feet towards the centre of the river: to add an additional row of piles to the piers on the east side of the river, adding twenty feet to its length, and to extend two rows of piles, as fenders, from the extremity of the pier towards the centre of the river, so that the piers and fenders shall extend one hundred and twenty feet into the river beyond low water mark, thus occupying within the piers and fenders two hundred and eighty-seven feet of the entire width of the river, and leaving a space of three hundred feet between the extremities of the fenders for the passage of vessels.

Upon the coming in of the answer, the complainants moved for an injunction, pursuant to the prayer of the bill. The cause having been heard before the Chancellor upon the bill, answer and affidavits of the respective parties, and the Chancellor being of opinion "that the charter or act of incorporation of the Newark Plank Road and Ferry Company authorises said company to build their wharves or piers in the Passaic river to such an extent only as to enable ferry boats of the company, of suitable dimensions, to reach such wharves or piers at low water, and such other works beyond the ends of the wharves or piers as may be necessary for



safely receiving their ferry boats and holding them at the ends of the piers, for the safe and convenient passag across said ferry, (if any such other works be necessary,) that it was the intention of the legislature that the river should be ferried by steamboats or other boats, and that it is to be ferried accordingly, as far as fairly practicable.

And the chancellor being further of opinion that the plan of the company mentioned in the information and bill, and in the answer of the defendants, by which the said company propose to construct their wharves, piers, and other works, in and upon said river, and upon which they were proceeding to construct the same at the time of filing the information and bill, extends into the river, to the obstructing of the navigation of vessels therein, *beyond what is necessary for the purpose aforesaid*, and beyond what is contemplated or authorized by the charter or act of incorporation of said company, on the 21st of July, 1851, did order *that an injunction issue restraining the defendants from constructing their works in and upon the Passaic river upon the place in said bill and answer mentioned*, or in the manner in said answer set forth, and *also from extending their piers or wharves into said river beyond points on each side thereof, which may be reached by ferry boats of the company, of suitable dimensions at low water.* On the fourth day of August, an injunction issued accordingly, and was duly served upon the company. On the *tenth of November*, notice was given to the defendants of an *application* to the chancellor that *an attachment issue against the defendants* for a *contempt in violating said order* and injunction in this, that they have erected their piers and other works further into the navigable waters of the Passaic river thereof than by the said order and injunction is permitted or allowed, and contrary to the said order and injunction, and also in this that they have continued and have not removed the said obstructions erected by them previous to said order and writ of injunction which were contrary to law and said order, but have made and are proceeding to make the same permanent. *Notice was also given that an application would be made at the same*



COURT OF ERRORS AND APPEALS.

JUNE TERM, 1855.

Between THE NEWARK PLANK ROAD AND FERRY COMPANY, DANIEL M. WILSON, EDWARD DOUGHTY, WILLIAM B. GUILD, JAMES H. TICHENOR, DAVID A. HAYES, and DANIEL PRICE, appellants, and L. Q. C. ELMER, Attorney General, at the relation of ISAAC VAN WAGENEN and others, and ISAAC VAN WAGENEN and others, respondents.

By the eighth section of the act incorporating The Newark Plank Road and Ferry Company, the company are authorized to construct a plank road, to commence in the city of Newark, east of Broad street, and thence, passing by the most convenient and direct course, to the bank of the Passaic river, near the old ferry, and across the meadow between the Passaic and Hackensack rivers, and through the county of Hudson, in the most eligible route, to its point of termination in said county and opposite the city of New York; and that it shall be lawful for the said company at any time to drive piles and erect or build piers, wharves, platforms, ferry stairs, or other works necessary for the said road and ferries thereon, in the said Passaic and Hackensack rivers; provided always, that the free and uninterrupted navigation of vessels in said rivers, or either of them, is not thereby prevented by any bridge, or other obstruction, in any manner whatever. The eleventh section provides that the company shall keep and maintain two good and sufficient ferry boats at the respective ferries on each of the said rivers, and shall cause lamps to be put up at the extreme point of each pier at said ferries, which shall be lighted before dark every evening, and kept lighted until daylight next morning. After the company had driven piles and indicated the distance to which they intended to project piers into the river, a bill was filed, praying an injunction restraining the said company from projecting piers, &c., into the Passaic river, and from obstructing the free navigation of said river.

Held, that the act gives the company the right to extend their works *beyond the banks of the river*: that the language of the proviso assumes that the works



are enjoined from conducting their works upon the Passaic river in the manner in their answer set forth, and also from extending their piers or wharves into the river beyond points on each side thereof, which may be reached by ferry boats of the company of suitable dimensions at low water.

It is material to observe by way of elucidation, that connected with the order for an injunction and embodied within the order and injunction, the chancellor has declared his opinion that the charter or act of incorporation of the Newark Plank Road and Ferry Company authorized said company to build their wharves or piers in the Passaic river to such an extent as to enable ferry boats of the company of suitable dimensions to reach such wharves or piers at low water, and such other works beyond the ends of the wharves or piers as may be necessary for safely receiving their ferry boats and holding them at the ends of the piers, for the safe and convenient passage across the said ferry, (if any such other works be necessary,) and also that it was the intention of the legislature that the river should be ferried by steamboats or other boats, and that it is to be ferried accordingly *as far as is fairly practicable.*

By this injunction the defendants are restrained first from constructing their works in the manner set forth in the answer. By the evidence of Edward Carter, the engineer of the plank road company, it appears that the plan upon which the works upon the Passaic were finally constructed, varied from the plan set forth in the answer in two particulars, viz: First. The row of piles designed to be added to the piers on the east side of the river was not driven, and one row of piles at the extremity of each pier has been taken up, and a floating bridge or platform has been substituted for the immoveable pier. Second. The piers with their wings have been shortened so that the clear space between the pilings for the passage of vessels has been extended from three hundred to three hundred and fifty feet. The mere change from a fixed pier to a floating platform occupying the same space, cannot be regarded as any essential change of plan. The objection in the mind of the chancellor to the

plan set forth in the answer was, that it projected farther into the river than was warranted by the charter to the obstruction of navigation. The change of the pier for the float in nowise relieved the objection or essentially altered the place in its obnoxious feature, the injury to navigation still remained the same. But the shortening of the piers, thereby diminishing the obstruction to navigation, and widening the channel fifty feet is an essential modification of the plan set forth in the answer, and relieves it to some extent, at least, of its objectionable character. It cannot be said that the works are constructed in the manner set forth in the answer, nor in a manner substantially the same, so far as its injurious effects upon the navigation of the river are concerned. Upon this point the defendants have committed no violation of the injunction.

The defendants were further enjoined from extending their piers or wharves into the river beyond points on each side thereof which may be reached by ferry borts of suitable dimensions, at low water.

A materal question upon this part of the case is, What is a ferry boat of suitable dimension for this ferry, and what would be the draft of water? A number of witnesses on the part of the complainants, some of them men of experience as ferry men and pilots, practically skilled in the management of ferry boats, testify that the draught of a boat of suitable dimensions for this ferry will not exceed three feet. They vary in their estimate of a proper draught, from two and a half to three feet. A single witness on the part of the defendants, (Selah Hill,) a boat builder, has expressed the opinion that the depth of water required for a boat which would be convenient for this ferry, would be five and a half to six feet. The weight of evidence founded on the opinion of witnesses is very decided that the draught of a boat of suitable dimensions would not exceed three feet. Yet this evidence is certainly not of the most conclusive or satisfactory character. It rests mainly on speculative opinion. Not one of the witnesses alleges that he has ever seen a ferry boat of that draught of water, or that he has ever seen



a ferry boat of any description in operation upon a ferry across a stream of the width of channel and rapidity of current of the Passaic river at the plank road ferry. There is no ferry in operation across the Passaic between Belleville and the bay, or within the flow of tide water. The boats used by the witnesses who are ferrymen, are used in deeper and broader streams, and have a greater draught of water. Their opinions are little better than mere theoretical speculations. Nor should it be lost sight of that the defendants themselves originally provided boats for this ferry drawing only two feet of water; they were abandoned as utterly inadequate to the purpose, and a boat drawing from four and a half to five feet of water was procured. At the time the evidence closed, this boat had not commenced running, and it was not then known whether it would or would not prove successful; at least there is no evidence upon this point. In considering the question whether this is a boat of suitable dimensions, some weight must be attached to the fact that the boat has been procured by the company to be run upon the ferry after boats of a lighter draught and of a different construction had been tried and abandoned. It must be assumed upon this investigation that the company, in so doing, acted in good faith for the interest of the stockholders, with the design of procuring a boat of suitable dimensions for practicability, and not with the sinister purpose of transcending their chartered powers, or evading the injunction by creating a fancied necessity for unduly extending their piers and obstructing the free navigation of the river. When the evidence in this cause closed, no experiment had been made of the efficiency of the vessel or its suitableness to the purposes of the ferry. The experiment, it may be presumed, has not been made; at any rate, the question is eminently a practical question, one that can be satisfactorily settled only by practical experience aided by scientific skill. By these means it is a question susceptible of ready and satisfactory solution, and there can be no necessity or propriety in attempting to settle it upon the strength of mere speculation or theoretical opinions; nor would it be

safe or proper to visit the defendants with penal inflictions, except upon the clearest and most satisfactory evidence that the boats which they have procured are unsuitable for the purposes for which they are designed. Without designing to express any opinion whatever upon the abstract question what would be the draft of water of a boat of suitable dimensions for this ferry, I think it proper to assume at this stage of the cause, and for the purpose of this hearing, that the boat of the company drawing four and a half to five feet, is, in accordance with the chancellor's opinion, a boat of suitable dimensions to be used upon this ferry. The inquiry remains, are the piers or wharves of the company extended into the river beyond points on either side which may be reached by boats drawing five feet of water by measurement made on the part of the complainants on the 22d of November last, at low water, as the witness testifies the depth of water at the extremity of the pier on the west side of the river was six feet four inches at the first row of piles; ten feet from the extremity of the pier, the depth was seven feet six inches; at the second row of piles, twenty feet nearer shore, the depth was seven feet four inches; at the third row of piles, six feet, and at the fourth row, seventy feet from the extremity of the pier, the depth was four feet. These measurements are on the north side of the pier; the depths of water on the south side are slightly variant, but not so as to materially affect the result. By measurements made at the same time, it appears that the depth of water between the extremities of the wings about sixty feet in a straight line from the end of the pier toward the centre of the river is six feet eight inches.

By measurements made on the part of the defendants on various days from the eighteenth of November to the ninth of December, 1851, the depth of water immediately in front of the piers on the west side of the river varied from four feet nine inches to six feet one inch; at the first row of piles, ten feet from the extremity of the pier, the depth varied from five feet to seven feet three inches; at the second row of piles, thirty feet from the extremity of the



pier, the depth varied from seven feet three inches to seven feet eight inches; at the third row of piles, fifty feet from the extremity of the pier, the depth varied from four feet eight inches to six feet, and at the fourth row of piles, seventy feet from the extremity of the pier, the depth varied from two feet one inch to three feet ten inches. The variations in these measurements, all professing to be made at dead low water, may no doubt be accounted for, in a great measure, by the variations in the tides. It appears, by the evidence of Aaron M. King, the book-keeper of the company, by whom the measurements on the part of the defendants were principally made, that at two of his measurements the tides were lower than he had ever seen them before, and that he made the measurements on those days because the tides were so low. These measurements, however, while they vary as to the depth of water at different days and different hours of the same day, all concur in showing that the water at the first and second row of piles is deeper than at the extremity of the pier; that at the third row of piles it is but two or three inches less, and that no material diminution in the depth of water is shown until reaching the fourth row of piles, a distance of seventy feet from the extremity of the pier. This shoaling of the water probably occurs gradually between the third and fourth row of piles, that is, at the distance of from fifty to seventy feet from the extremity of the pier. The evidence further shows that the depth of water from thirty to fifty feet between the extremity of the pier and the shore, is greater than it is for the same distance from the extremity of the pier to the centre of the river. Upon this point there is no conflict nor contradiction in the testimony. The evidence upon both sides concurs.

We have, then, the fact as established and uncontradicted, that the depth of water is as great from the present extremity of the western pier to a distance of fifty feet nearer shore, as it is at the extremity of the pier, and that a boat of a given draught of water may reach a pier or float at least fifty feet nearer the shore, with as great facility as it does at the present termination of the pier.

Admitting then that the boat of the company drawing five feet of water is of suitable dimensions, it is obvious that it could reach a pier at least fifty feet nearer shore with the same facility that it reaches the present terminus of the pier. This extension of the pier is the more remarkable from the fact that at the time of filing the answer when the work was projected and partly accomplished, the boats procured and designed to be used by the company, drew only two feet of water. With boats of that draught there would seem to be no difficulty in approaching much nearer the shore on both sides of the river; in this aspect of the case, the piers seem to have been constructed without the least reference to the depth of water necessary for the draught of the boats. I have looked carefully through the evidence to ascertain what necessity led to so great an extension of the piers, but without success. It cannot have arisen from the necessity of having a greater depth of water under the boat to render her manageable, for the evidence clearly shows that a boat lying fifty feet nearer the western shore, will float in deeper water than in her berth at the extremity of the present pier. Nor can it have arisen from any supposed necessity for shortening the ferry, for all the evidence agrees that in the tide-way where the current is strong, boats driven by paddle wheels are more manageable in a long ferry than in a short one. The answer explicitly states that the design of the company at that time was to use boats driven with paddle wheels, and not with an endless chain. And although the paddle wheels have been abandoned and an endless chain substituted, there is no allegation or pretence in the evidence that the addition of fifty to one hundred feet to the length of the ferry would prevent or impede the operations of the ferry with its present equipments.

In considering the evidence, the fact has not been lost sight of that piers with the swings, as finally constructed occupy fifty feet less of the channel of the river than they did upon the plan set forth in the answer. But, notwithstanding this change of plan, I find nothing in the evidence to induce the belief that the termination of the floating bridge



on the west side of the river, is any nearer the shore than was indicated by the original plan; all the evidence, as well as the line of argument adopted by counsel, warrant the conclusion that the termination of the western pier is not materially different from what it was at the time of the measurements made by the agents of both parties on the twenty-second of November, 1851.

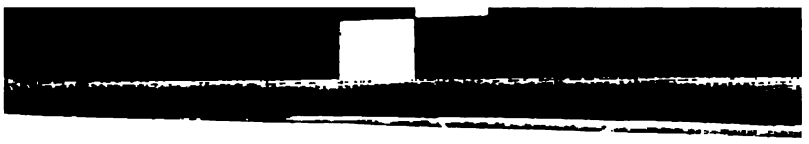
The conclusion is unavoidable that the order and injunction of the court have been violated in this, that the defendants have not refrained from extending their piers or wharves into the river beyond points on each side thereof, which may be reached by ferry boats of the company of suitable dimensions, at low water.

1. It has been said that there is no necessity apparent from the evidence why the piers should have been originally constructed to extend into the river so far beyond the limit indicated by the order and injunction of the court. Evidence has been offered, however, as facts, though not operating at the original projection and construction of the piers, to justify its continuance in its present extent. The effect of this evidence remains to be considered.

It appears that as the plank road was originally constructed, its termini on both sides of the Passaic river were contiguous or very near the termini of the Morris canal. That on the west side of the river the terminus was south of the terminus of the canal; while on the east side of the river the terminus of the road was north of the terminus of the canal; as a necessary consequence, the track of the ferry boats, in crossing the river, intersected the track of the canal boats, so that the boats seriously interfered with each other in their transit, and the canal boats were further obstructed by being carried by the tides against the piles of the piers of the road. As a consequence of these difficulties, the plank road company were compelled or induced, at the instance of the canal company, to change the route of the canal so that its termini, on both sides of the river, should be south of the termini of the road; this change was effected by carrying the canal under the road or platform of the pier

at the second row of piling from its western extremity; the platform at that point was of necessity raised to admit the passage of the canal. It is further shown, in evidence, that as the work is now constructed, the terminus of the western pier cannot be brought nearer the shore. 1st. Because, in consequence of the construction of the canal, the float cannot be brought nearer the shore; and, 2d. Because the elevation of the platform over the canal would render the descent from that point to the extremity of the pier, too steep for convenient access to the boat. These facts are proved by a single witness, examined on the twenty-second of April, after the case had been set down for argument. There is, however, no contradictory evidence, and the facts thus stated will be taken as satisfactorily proven. Assuming the facts as fully proved, it is clear that they had no existence and were not within the contemplation of the defendants when the work was originally planned or constructed, nor when the application for an attachment was originally made. It is not perceived how, in any aspect of the case, they can justify the defendants in violating the injunction, or purge the contempt when actually incurred. But waving this preliminary objection, the evidence does not show any satisfactory reason for the existence of the state of facts which creates the supposed necessity for an extension of the pier.

It does not appear that by proper precaution on the part of the defendants in the original construction of the road, the whole difficulty might not readily have been avoided, nor does it appear but that, in effecting the recent alteration, the course of the canal might have been changed and carried under the road at a point more remote from the river, and thus the whole difficulty have been effectually relieved. Indeed, from the evidence, it appears affirmatively that it was a mere question of dollars and cents of expense to the defendants whether the course of the canal should have been diverted at a point more remote from the river. Under such circumstances, the defendants certainly cannot rely upon their own carelessness or mistake, or regard to mere



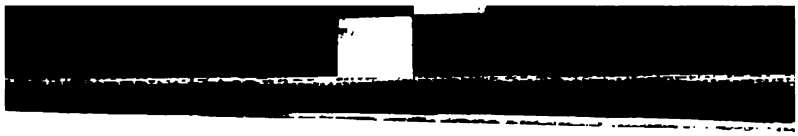
economy in expenditure, to justify a violation of the order and injunction of the court, and an encroachment upon the waters of a navigable river.

It was further insisted, on the part of the defendants, that at the point of the river where the ferry is located, owing to the straightness of the river and width and the depth of the channel, the navigation is better than at any other point between Newark and the bar at the mouth of the river, and that the piers, leaving an unobstructed passage of three hundred and fifty feet, present no obstruction or injury whatever to navigation. This is a point upon which the evidence is conflicting, and upon which this court is not authorized to express an opinion. It is not an open question. The Chancellor's opinion is the only test by which the legality of the defendants' operations are now to be tested. He has settled that the works of the defendants are not to be projected into the river beyond points which may be reached by suitable boats. That any encroachment upon the river beyond either of these points, is an obstruction to navigation in violation of the charter, and a contempt of the order and injunction of the court.

I am of opinion that the work is constructed in violation of the order and injunction of the court, and that no fact or circumstance has been shown which can justify the violation or relieve the defendants from the penalties of a contempt. It has already been said that this court cannot, with the evidence before it, with any propriety, settle the construction or necessary draught of water of boats of suitable dimensions to be used on the ferry. Consequently, no opinion can be formed or expressed upon the extent to which the piers or wharves of the company may, under the opinion of the Chancellor, be extended into the river. There are other points, affecting the question at issue between these parties, in regard to which there is much conflict of opinion among the witnesses, and upon which the court, upon the evidence before it, is not warranted in expressing an opinion. These are: the depth of water necessary to float a ferry boat of a given draught, so that the boat shall remain entirely manage-

able; the effect of the running of a ferry boat and of the tides and currents of the river in deepening or filling up the channel at the ends of the piers. These are questions which observation and practical experiment alone can satisfactorily determine. In order that the defendants may be fully protected in the enjoyment of their corporate franchises, and the complainants and the public secured in the enjoyment of all their rights in the navigable waters of the Passaic, it is necessary that these questions should be examined and satisfactorily settled. To grant an attachment against the defendants and hold them liable to the penalties of a contempt of the order and injunction of the court before their rights under that order are clearly and definitely settled, can lead to no beneficial result or final adjustment of the difficulty. It is important, therefore, for the interests of all parties, that these questions be settled before proceeding against the defendants for the penalties of a contempt, and to this end, I am of opinion that it should be referred to one of the masters of the court, or to other suitable person or persons, to ascertain and report to this court the depth of water necessary to float boats of suitable dimensions to be used at said ferry; the distance to which the piers on each side of the river should extend into the river for the proper accommodation of such boats; the necessity, if any there be, for the use of pilings as fenders for boats propelled by an endless chain, and the necessary extent of such fenders, and the manner in which the piers, wharves and other works of the plank road company should be erected, in order to conform to the opinion of the Chancellor, and to the order and injunction of the court.

It was objected upon the argument that no order of reference, for the purpose contemplated, can now be made by the court; that such order should have been made by the Chancellor upon the application, and if his decision was not satisfactory, redress must be had by appeal. No authority was cited to support the position, and I know of no principle upon which it can be sustained. The Chancellor was asked for an injunction to prevent a nuisance in the waters of a



navigable river, and he granted it, giving, at the same time, his opinion most clearly as to the extent of the defendants' rights. The court at that time not having sufficient information to give more specific direction as to the manner in which the works of the company should be constructed, necessarily left it to the judgment of the company, subject to the provisions of their charter, and the directions contained in the order of the court. The Chancellor, it is now apparent, acted with great wisdom in not attempting at that stage of the work to give specific directions respecting its proper execution, or even referring it to an officer of the court to make report respecting it.

The operations of the company show clearly that aside from the unavoidable delay incident to such a measure, the step would have proved in the highest degree disastrous to their interests, with all the practical and scientific skill it may be presumed they have brought to the execution of their works; many of their operations have been mere experiments, and those experiments have proved failures. They tried horse power, but abandoned it for steam. They tried ferry boats with two feet draught of water, and supplied their place with boats of a draught of five feet. They tried boats propelled by paddle wheels, but have adopted an endless chain as a substitute. They drove fixed pilings to the very ends of their piers, but have supplied their places by floating platforms. These experiments, we presume, were made in good faith, with the aid of all the lights which experience and skill could furnish. It is clear that any report made by a master, and any conclusion adopted by the court, might at that period have proved equally erroneous and far more disastrous to the interest of the defendants. The Chancellor at that time wisely declined to interfere. But no such difficulty exists at present. It may safely be inferred that with the experience of the company, a safe and satisfactory conclusion upon the points in question may, without difficulty, be arrived at.

It is further objected that it is to be inferred from the language of the order that the Chancellor did not design to

enforce obedience to the injunction by attachment, nor to abate any part of the work actually erected, but to leave the defendants to be proceeded against by indictment for a nuisance in case of a violation of their charter or of the order of the court. But it is clear that the injunction would be a nugatory and idle process unless the court lend its aid to enforce its mandate. Whether the court will hereafter enforce obedience to its mandate and a compliance with its directions solely by process for contempt, or whether it will order so much of the works of the company as are erected in violation of the decree and injunction of the court to be abated, is unnecessary now to inquire.

It is clear that the court have not at present the necessary information, if the order were otherwise, proper to enable it to decide how far the works of the company have been erected in violation of the injunction, nor, consequently, how far they ought to be abated.

I do therefore respectfully advise his honor, the chancellor, that the defendants have violated the order and injunction of the court, and that an attachment issue against them for contempt. But, inasmuch as it does not satisfactorily appear by the evidence before the court to what extent the injunction has been violated, nor how far the works of the company would require to be altered to conform to the order and injunction of the court, I do further respectfully advise his honor, the chancellor, that before an attachment issue against the defendants for contempt, it be referred to one of the masters of the court or other suitable person or persons, to ascertain and report to the court with all convenient speed, the manner in which the piers, wharves, and other works of the said company should be constructed in order to *conform to the order and injunction of the court*, and that the said master do particularly report the depth of water necessary to float boats of suitable dimensions to be used at such ferry, the proper construction and draught of such boats, the distance to which the piers should extend into the river upon each side for the proper accommodation of such boats, and whether wings or fenders projecting be-

yond the ends of the piers are necessary for boats propelled by an endless chain, and the proper extent of such wings. And I do further respectfully advise his honor, the chancellor, that the application for an order to abate any part of the works of the defendants ought in the present state of the cause to be denied.

REPORT OF MASTERS.

In pursuance of an order in this cause made by the chancellor, bearing date the sixteenth day of November, in the year of our Lord one thousand eight hundred and fifty-two, whereby it was referred to the subscribers, as masters of said court, to ascertain and report the manner in which the piers, wharves, and other works of the Newark Plank Road and Ferry Company on the Passaic river should be constructed in order to conform to the prior order and injunction of the said court, and particularly report the depth of water necessary to float boats of suitable dimensions to be used at said ferry, the proper construction and draught of such boats, the distance to which the piers or wharves should extend into said river upon each side, in order to enable ferry boats of suitable dimensions to reach the same at low water, and whether wings or fenders beyond the ends of the piers or wharves are necessary for boats propelled by an endless chain, and if the same are necessary, the proper extent of such wings or fenders.

We, Joseph P. Bradley, Ashbel Welch and Aaron Robertson, do hereby certify and report to the chancellor:

That we have visited and inspected the ferry and premises of the defendants referred to in the said order, and the boat now used on said ferry, and have witnessed the operation thereof, and have also taken the depositions of divers witnesses produced before us by the parties upon due notice given, and also of witnesses called by ourselves at our own instance, which depositions we hereby return to the court with this our report; and the counsel for the complainants also produced before us the pleadings in this cause, and the



enforce obedience to the i... ...ts heretofore taken therein: abate any part of the w... ...a map of the premises, exhibit- defendants to be pre... ...of the said ferry, and the soundings sance in case of a... ...dinary low water, is hereto annexed the court. Br... ...reference in this our report. And we nugatory ar... ...and do report that the ferry boat now used enforce i... ...on the said ferry is in length, eighty-one force c... ...and seventy feet on the keel: in width, thirty- rect... ...deck, thirty feet beam under the guards, and or... ...four feet at the bottom; and in depth, seven feet be- ...planks. Her bottom is flat, and her draught when light, (that is, with nothing but her engines, boiler, appa- ratus, fuel, &c., on board,) is two feet and six inches: her draught, when loaded to the extent she is liable to be loaded, is three feet and six inches. Her section at the water line, when light, being about seventeen hundred superficial feet, and increasing as she settles, it would require nearly fifty tons to increase her draught one foot; and fifty tons is more than equal to the weight of ten double-horse teams, with wagons loaded, which is as large a load as the boat can well carry. This boat is propelled by a chain fastened on each pier or wharf, and passing through the boat and around drums worked by steam engines, with two of which the boat is provided. The boat is held from drifting too far sideways by two additional chains passing through pulleys, one chain under each guard.

And we do further report that we are satisfied from the observations and from the experience of the said company, attested by the evidence before us, that the said boat, in its construction, draught, and apparatus, is the most useful and convenient boat that can be worked on the said ferry.

And we do accordingly ascertain and report that the said boat, so above described, is a boat of suitable dimensions and of proper construction and draught to be used at the said ferry.

And we do further certify and report that in our opinion in view of the depressions of the tide to which the Passaic river is subject, and of the commotions caused by vessels



gating the same, five feet of water, at ordinary low tide, ..cessary to float a boat of such suitable dimensions as ..oresaid, in order to give to the said company the fair use of the said ferry, and that such depth is sufficient for that purpose.

And we do further certify and report that to enable ferry boats of suitable dimensions, as aforesaid, to reach the piers, wharves, or floating bridges of said ferry, (such boats having a projection at each end of five feet on deck, beyond the bottom thereof,) the said piers, wharves, or floating bridges should extend into said river, upon each side of said river, to within five feet of the point nearest to the shore, at which the water is five feet deep at ordinary low water; and that, to this end, the pier, wharf, or floating bridge on the east side of said river should extend into said river, as it now is seventy-seven feet from the shore, and row of piles there situated, the position of the line of the shore being designated on the map hereunto annexed, by a large dot, marked A, and the position of the said point to which said pier, wharf, or floating bridge should extend, being designated by the dotted lines, marked B. And the pier, wharf, or floating bridge on the west side of said river should extend into said river, as it is now is, seventy-two feet from the shore, or sixty-four feet from the first row of piles now standing below high water mark; the position of the line of the shore being designated on the said map by a large dot marked C, and the position of the said point to which said pier, wharf, or floating bridge should extend, being designated by the dotted line marked D.

And we do further certify and report that, in our opinion, wings or fenders, beyond the ends of the piers, wharves, or floating bridges, are necessary for a boat propelled by a chain in the manner above described, or, as it is expressed, "by an endless chain," and that the proper extent of such wings or fenders, for the said ferry, and with a boat of the dimensions aforesaid, is eighty feet in length from the ends of the piers, wharves, or floating bridges, as hereinbefore fixed; extending out towards the centre of the river on each side of the

boat, (when in her berth,) so that the outward ends of said wings may be about seventy-five feet apart; and have suitable inclinations for guiding the boat in entering, and sufficient length with parallel sides to hold the boat steady when at the wharf or floating bridge, and that the said wings and the said piers, wharves, or bridges should be planked down to the level of low water.

And we do further certify that the piers, wharves, and works of the said company in said river should be constructed in the manner above specified in order to conform to the former order and injunction of the court in this cause above mentioned.

All which is respectfully submitted. Dated Newark, February 14th, 1853.

JOSEPH P. BRADLEY,
ASHBEL WELCH,
AARON ROBERTSON.

EXCEPTIONS TO MASTERS' REPORT.

Exceptions taken by the Newark Plank Road and Ferry Company and each and every the defendants in the above stated suit, to the report of Joseph P. Bradley, Ashbel Welch, and Aaron Robertson, made in this cause and dated February the 14th, A. D. 1853.

First Exception. For that it appears by the bill of complaint filed in this cause, and by the decree of the chancellor made thereon, and by the said report, that the said report relates to matters about which by the said bill no report is prayed, and about which the said decree is silent.

Second Exception. That the said report relates to matters about which the defendants were entitled to the benefit of their own answer, and the said report was made without the defendants having any opportunity first to make their answer in relation thereto.

Third Exception. For that it appears by the order referring the matters therein stated to the said Joseph P. Bradley, Ashbel Welch, and Aaron Robertson, that the boat, in



relation to the use of which their inquiries were thereby directed, was a boat propelled, as it is expressed, by an endless chain; and it appears by the depositions, exhibits, and proofs in the said report referred to, that such a boat cannot be used without floats being fixed and adjusted under a movable bridge at the end of each pier, which may rise and fall with the tide, and so the said bridge be made to accommodate itself with the elevation and depression of the said ferry boats, and the said Joseph P. Bradley, Ashbel Welch, and Aaron Robertson have in their report made no provision whatever for the use of such floats, and no allowance of water therefore, and made no report in relation thereto.

Fourth Exception. For that the order referring the matter to the said Joseph P. Bradley, Ashbel Welch, and Aaron Robertson, directed therein to report how far the said piers should extend to enable boats of suitable dimensions to reach the same at low water, and it appears by the depositions, exhibits, and proofs referred to in said report, that the water sometimes fell so low, that the boats, in said report approved would be aground and unable to be used.

Fifth Exception. For that while the said report states that the waters in said river are subject to commotion caused by vessels (other than the ferry boat) navigating the same, which affect the said ferry boats and render more water necessary than would otherwise be requisite, the depositions, exhibits, and proofs show that at the points fixed by the said report as the extreme limit of said piers, the ferry boats would be so affected by the said commotions that the said boats would be much incommoded and injured thereby.

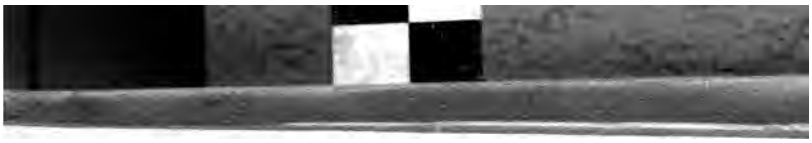
Sixth Exception. For that the order of this court, dated November the 16th, A. D. 1852, referred to in said report, refers the matters therein contained, to Joseph P. Bradley, Ashbel Welch, and Aaron Robertson, as masters of this court, the said Ashbel Welch and Aaron Robertson being by the same order appointed for this purpose to the office of masters of this court, with all the powers and authority of the masters of this court, and that the laws of the state of New Jersey and the rules of this court require, and the said

order contemplated, that the said Welch and Robertson, before entering upon any of the duties of a master or examiner of this court, should take certain oaths by the said laws and rules made requisite and essential to be first taken; and that neither the said Welch nor the said Robertson had at any time before nor since the said appointment taken any of such oaths, and were consequently unauthorized and not empowered to discharge any of the duties of masters of this court, and had no authority to make any report to this court under the directions of said order.

Seventh Exception. For that it appears as well by the inspection of the depositions in the said report referred to, as by the statement of the said report, that the said Joseph P. Bradley, Ashbel Welch, and Aaron Robertson, pretended to act as masters of this court, and, as such, to take depositions and evidence, on which the said report states that the said report is founded, and did together pretend as masters of this court to administer the oaths to witnesses, and together to sign the jurat to said depositions, and yet neither the said Welch nor the said Robertson had at any time, as masters of this court, the right to administer an oath or take a deposition.

Eighth Exception. For that the said order of the 16th of November, A. D. 1852, refers the matter therein stated to the said Joseph P. Bradley, Ashbel Welch, and Aaron Robertson, as masters of this court, as is truly stated in said report, and it is only as such masters duly qualified according to law by virtue of their office, that under the said order the said Joseph P. Bradley, Ashbel Welch, and Aaron Robertson were authorized to make an investigation, or that their report can be received by this honorable court, and yet not only were the said Welch and Robertson never qualified to act as masters, but although the said order declares that they were appointed for that express purpose, neither they, nor the said Joseph P. Bradley make their report as masters of this court.

Ninth Exception. For that the said report is in other re-



spects erroneous, and is contrary to law and evidence, and has many errors and inaccuracies therein.

In all which respects the said exceptants do except to the said masters' report, and respectfully appeal therefrom to the judgment of this honorable court.

DAVID A. HAYES,
Sol. and of Counsel with Defendants.

On motion to set aside the report of Joseph P. Bradley, Ashbel Welch, and Aaron Robertson, Esq'rs.

GREEN, C. J. The first and second exceptions are that the report relates to matters not within the relief prayed by the bill and granted by the decree; and in relation to which the defendants have had no opportunity to answer.

It is not alleged that the report relates to matters not submitted to the Masters for their examination, nor that they have in any wise exceeded the powers conferred upon them by the order of this court. The report, as to its subject matter, is strictly in accordance with the order of reference.

If there be anything in the exceptions, the objections should have been urged against the order, rather than the report. If the order is proper, the exceptions are groundless.

But aside from this preliminary objection, the exceptions cannot prevail, because the matters contained in the report are strictly within the scope of the bill and decree. The bill seeks to enjoin a work which the defendants were engaged in constructing. upon the ground that it would create a nuisance in the navigable waters of the Passaic river. The prayer of the bill is that the defendants may be restrained.

1. From constructing their work upon the plan adopted by them.

2. From constructing any piers or other works in or upon the Passaic, whereby the free navigation of the river may be in any wise obstructed.

3. From erecting any piers or other works in or upon the Passaic, other than such as are authorized by the charter of the Newark Plank Road and Ferry Company. And,

4. That the nuisance and obstruction already created by the defendants, by driving piles in the river for the erection of a pier, may be abated.

The bill denies the right of the defendants to erect piers in the Passaic upon the plan proposed, or any piers whatever, alleging that any pier erected in the navigable waters of the river will create a nuisance.

The defendants, by their answer, admit that they are engaged in constructing the work complained of. They set forth specifically the plan upon which the work is proposed to be constructed, and the distance which the piers will extend into the river; and allege that it will create no nuisance or obstruction to navigation. They claim the right, under their charter, to erect piers in the river, and insist that they may lawfully do so to the full extent proposed in their plan.

Upon these pleadings the Chancellor declared his opinion to be that the defendants have the right under their charter to construct piers in the river to such point on each side thereof, and to such extent only, as to enable ferry boats of suitable dimensions to reach such piers at low water; but that it was not necessary or lawful that piers or other works should be extended into the river as far as was proposed by the plan of the defendants. An injunction was accordingly issued.

It was subsequently decreed by this court that the defendants, in the prosecution of their work, had extended their piers into the river further than was authorized by their charter, in violation of the injunction of the Chancellor. To determine satisfactorily the point to which the piers may be extended into the river by the defendants under their charter, and in conformity with the opinion of the Chancellor, was the object of the reference. All the matters contained in the order of reference and in the report, are involved in this one inquiry, or are auxiliary to it. The inquiry is directly

within the scope and prayer of the bill, and within the issue made by the pleadings, whether the defendants may lawfully erect piers in the Passaic river, and if yea, to what extent, are the issues made by the bill and answer.

The third, fourth and fifth exceptions relate to errors and inaccuracies in the subject matter of the report. On a careful examination of the report and of the evidence, I find no such eirors as are alleged. The masters have furnished the information sought by the order of the court, and their views are fully sustained by the evidence.

The fourth exception is, that it appears by the report that in extraordinarily low tides, which may occur at long intervals, there will not be sufficient water at the points designated for the termination of the piers, to float a boat of suitable dimensions to be used at the ferry. The same observation may be applied with truth to a great majority of ferries located upon tide waters. It is to the regular and ordinary, and not to the occasional and extraordinary flow and ebb of tide, that the opinion of the Chancellor manifestly refers. To affirm that there must be sufficient depth of water for the ordinary use of the ferry at the lowest neap tide, acted upon by winds of extraordinary violence, would be equivalent to affirming that the ferry could have no existence. The masters have taken the only proper and just view of the question.

The sixth exception is, that two of the persons by whom the report is made were not sworn as masters, as required by law and by the rule of this court, and had therefore no authority to make a report.

By the order of reference it is "Referred to Joseph P. Bradley, Esq., one of the masters of this court, and to Ashbel Welch and Aaron Robertson, Esqrs. who are hereby and *for this purpose* appointed masters of this court, with all the power and authority of masters of this court," to ascertain and report, for the information of the court, certain matters of fact therein specified.

Masters in Chancery are not within the provisions of the statute requiring certain officers appointed under the autho-

rity of the state to take an oath of office. The obligation upon masters to be sworn, is imposed by the rule of the court of chancery. The master may be sworn before the clerk of the court, an officer not authorized by the statute to administer oaths. The form of official oath taken by the master, varies in its terms from that prescribed by the statute. The failure to take the oath, therefore, is a violation, not of the statute, but of the rule of court.

It may well be doubted whether the failure to take the oath, in the present instance, is a violation of the rule. The individuals named were designated as masters for a special purpose, viz: to ascertain and report certain matters of fact submitted to them in this case. They were not regular or permanent officers of the court. Upon the performance of a special duty their functions ceased. They had no power to take acknowledgment of deeds, to administer oaths, unless in this case, or to perform any of the duties of masters in chancery, except the special service delegated. They could not with propriety, have taken the oath prescribed by the rule, to "perform *all the duties* of the office of master in chancery." They were not masters in chancery, in the ordinary and strict sense of the term. And the true inquiry would seem to be, whether a master may legitimately be appointed for a special purpose; and if not, then whether a reference may be made to persons, not masters, to ascertain and report, in conjunction with a master, matters of fact for the information of the court.

It is unnecessary, for the purposes of this case, to decide these questions; for, admitting the irregularities to exist to its utmost extent, it can afford no ground for setting aside this report. The object of the reference was not to obtain a judicial decision of any question, but merely to inform the conscience of the court, upon certain questions of fact. These questions had been submitted to the determination of the court, upon evidence taken in the cause. The court might regularly have decided the case upon that evidence. But the questions being of a nature which rendered a personal examination of the premises, by persons possessed of

practical and scientific skill, highly desirable, if not absolutely necessary, they were referred to persons possessing such qualifications, for their examination and report. It was believed that their investigations would lead to a more satisfactory result than either the direct and immediate action of the court, an examination and report by a master, or a trial by jury.

In regard to verdicts of juries upon disputed questions of fact, the rule in equity is well settled. The judge who directs the issue may act upon it, determine against it, or direct a new trial at his discretion. He may disregard the misdirection of the judge, and the erroneous admission or rejection of evidence upon the trial, and may, notwithstanding the most apparent irregularities of this kind, refuse a new trial, provided he is satisfied, from the evidence as it exists, and from the record in equity, that the means of forming a correct judgment are before him. *Hubback on Ev. of Suc.*, 56. 1 *Green's Chan.*, 512. *and cases cited.*

This principle is properly applicable to the present inquiry. The object of the reference has been fully attained. The facts in question have been investigated and ascertained, to the satisfaction of the court, after careful inquiry and personal examination, by individuals eminently qualified for the service, who were selected and appointed with the approbation of both parties. Under these circumstances, if the report should be set aside for illegalities or informalities, there would be no propriety in a new reference, or further investigation of the facts. The court being satisfied, its decision must be in accordance with the result of the investigation already made. The objection affects neither the merits of the inquiry, nor the propriety of the result.

These considerations apply with equal force to the seventh and eighth exceptions.

I do, therefore, respectfully advise his Honor the Chancellor, that the exceptions be overruled.

Dated January 20th, 1854.

From that part of the decree overruling the exceptions to

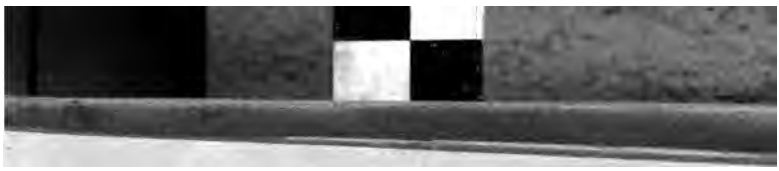
the masters' report and confirming and making it absolute; and that orders the attachment to issue against the defendants, and that orders the wharves, &c., abated, and that orders the defendant to pay the complainants' costs and charges; the defendants appeal to this court.

Mr. *Frelinghuysen* for appellants.

Mr. *Whitehead* for respondents.

The opinion of the court of appeals was delivered by

ELMER, J. The bill in this case was filed June 18th, 1851, and thereupon an order was made that the defendants show cause why an injunction should not issue, and that in the meantime they refrain from prosecuting the contemplated work. The defendants put in their answer, and affidavits were read on both sides. On the seventeenth day of July, the Chancellor having heard the parties, ordered an injunction. Subsequently, an application was made for an attachment and for an order of reference to a master. Upon the hearing of these applications, November 16th, 1852, it was adjudged that the defendants had violated the order and injunction of the court, and that an attachment should issue against them for a contempt; but inasmuch as it did not satisfactorily appear by the evidence before the court, to what extent the injunction had been violated, nor how far the works of the company would require to be altered, to conform to the order and injunction, it was ordered that it be referred to a master of the court, and to two other persons, specially appointed for that purpose, to ascertain and report to the court the manner in which the works of the company should be constructed, and other matters connected with such construction. The masters made their report February 14th, 1853, to which exceptions were put in, and the case being heard, a decree was made February 9th, 1854, confirming the report of the masters, and that the attachment before ordered, be issued, and that so much of the piers,



wharves, floating bridges, and works of the company, as in the report and decree were mentioned, and stated to have been erected contrary to and in violation of the aforesaid order and injunction, be abated.

From these three several orders or decrees, the defendants took separate appeals, May 15, 1854; and the first question to be settled by this court is, whether the appeals from the two first orders have been taken in time. This depends upon the question whether either of them was a final decree, within the meaning of the act, which requires that all appeals, except from final decrees, shall be made within forty days after the order or decree appealed from. *R. S.* 921, § 80.

Neither of those decrees disposed of the whole merits of the case, but left important questions for further examination and the future judgment of the court. They were, therefore, not final decrees. *Mills v. Hoag.* 7 *Paige* 18; 2 *Dan. Ch. P.* 1199, *notes and cases there referred to.* The appeals not having been made within forty days, must therefore be dismissed with costs.

It is, however, manifest that the appeal on the final decree, made February 9th, 1854, really involves the merits of the whole case; and this was not disputed by the counsel of the respondents. The first question, then, which arises is, whether the preliminary decree, made November 16th, 1852, was correct. It is objected that it is erroneous, upon the grounds that it was essential to the jurisdiction of the court; that the works contemplated by the company and complained of, would be a nuisance; and that the Chancellor did not decide this question, but simply decided that the company was not authorized by their charter to construct their works upon the contemplated plan; and that his construction of the charter was wrong.

Without deeming it necessary to examine the cases cited in reference to the jurisdiction of the court, and admitting, for the purposes of this cause, that the counsel of the appellants are right, and the sole ground upon which the court could interfere was, that the contemplated plan would create a nuisance; I am of opinion that the decree does virtually

decide this question, and decides it correctly. The charter authorizes the company to drive piles and erect certain works in the Passaic river, necessary for their road and ferry, provided that the free and uninterrupted navigation of vessels in said river, was not thereby prevented by any bridge or other obstruction in said river, in any manner whatever. On the part of the complainants it was urged that this proviso prohibited any bridge or other obstruction in the river, and that the company could not erect any works within the banks of the river. The Chancellor held that this position was not correct, and that the proviso assumes that the works authorized would be an obstruction to the river, but provides that no such obstruction should be erected as would prevent the free and uninterrupted navigation of the river. He further held, that the true construction of the act is, that the company are authorized by it to build their wharves and piers in the river to such extent only that a ferry boat of suitable dimensions may reach such wharves or piers, as may be necessary for safely receiving their ferry boat and holding it at the ends of the piers, for the safe and convenient entering upon and leaving said boat. And being of opinion that the plan of the company extended into the river, to the obstruction of the navigation of vessels therein, beyond what was necessary for the purposes aforesaid, and beyond what was contemplated by the act of incorporation, he ordered an injunction accordingly.

If the contemplated plan would occasion an obstruction to the navigation of the river beyond what the charter authorized, as he expressly decided, the works would be a nuisance. Every wharf, pier, or bridge, is not necessarily a nuisance, because instead of injuring, it might in some cases benefit the navigation; but every erection in a navigable river, which obstructs or hinders the navigation, is a nuisance, for the fact that it does obstruct or hinder the free navigation to which the public is entitled, is precisely what makes it a nuisance, "*ad commune nocumentum.*"

Whether the court was correct in deciding that the company had a right to put some obstruction in the river, so



that they did not go beyond what he deemed to be authorized by the act, is not before us, the complainants not having appealed. The distinction drawn by the chancellor between works that would be an obstruction to the river, and such an obstruction as would prevent the free and uninterrupted navigation of vessels in the river, seems to me somewhat difficult to comprehend. But whether this distinction can or cannot be fairly made, I am clear in the opinion that he extended the rights of the company quite as far as the charter will justify, and therefore committed no error of which they can complain. Upon the facts disclosed, the works contemplated in the plan adopted would have to some extent obstructed the navigation, and would have prevented the free and uninterrupted navigation of vessels, giving to those words of the proviso the most favorable interpretation the company could properly claim. It is well settled that grants of this nature are to be construed strictly. To extend the meaning of the proviso, so as to authorize any kind or degree of interruption to the navigation beyond what was reasonably necessary for the purposes of such a ferry as the act contemplated, would be to construe the grant with the utmost laxity. I cannot assent to the argument of the defendant's counsel, that if the company left a passage through which vessels might ordinarily pass in safety, analagous to the draws in certain bridges over the same stream, they would not prevent the navigation of vessels in any manner contemplated by the proviso. A ferry is altogether different from a bridge. The latter can seldom, if ever, be erected over a stream navigable for sailing vessels of any considerable size, without to some extent hindering the navigation. The laws authorizing them generally prescribe such draws as will prevent them from doing so to any great extent. Without legislative authority, no one has a right to do this to any extent; and where a law authorizes an obstruction without defining the precise nature of it, it must be restrained to what is reasonably necessary to effect the purpose intended.

A vessel navigating a river, has a right to the unobstruct-

ed use of all its natural width, and if that width be unnecessarily diminished, so as to impede the navigation at all times, by night and by day, at high water or low water, in fair weather or in foul, the structure which occasions the injury is a nuisance. It does not necessarily follow that every wharf or pier, or even every bridge, does this; but that the contemplated piers would have had that effect, I think was very manifest, upon the facts disclosed by the bill, answer, and proofs.

When a case of this kind is presented, it is in the discretion of the court whether it will act upon the facts before it, or require the question of nuisance to be passed upon by a jury. In all doubtful cases, the latter course should be adopted. But this was not a doubtful case. If the company proceeded on the plan proposed, it was perfectly evident they would to some extent interfere with the navigation; and this they hardly deny. They insist that the charter gave them full power to do all they proposed, and then "deny that the construction of the piers as proposed, will obstruct or injure the navigation of the said river, in a material manner, or that it will at all prevent the free and uninterrupted navigation of said river, with ordinary care." The issue made is, that the piers were proposed to be built as the charter authorized, and would not prevent the free and uninterrupted navigation to any greater extent than was intended by it; and not that independent of the charter, they would not so hinder and obstruct the navigation as to constitute a nuisance. Upon the latter point, the case was too plain to admit of a reasonable doubt, and there was therefore no necessity for a trial by jury. The real question at issue between the parties was as to the meaning of the charter, and this the chancellor decided quite as favorably for the company as a sound construction of it warranted.

It is next objected, that the decree made in 1852, and the final decree consequent thereon, are erroneous in adjudging the defendants to be in contempt. The first decree enjoined them from constructing their works in and upon the river, upon the plan in the bill and answer mentioned, or in the

manner in said answer set forth, and also from extending their piers or wharves into the river, beyond points on each side thereof, which may be reached by ferry boats of suitable dimensions at low water; and then proceeds to declare, "that the chancellor not having before him sufficient information to give any more specific direction as to the manner in which the wharves, piers, and other works of said company in said river shall be constructed, it is necessarily for the present left to the judgment of the said company, subject to the provisions of their charter, and the directions contained in this order, and the action of the proper authorities, if the provisions of said charter shall be violated."

The Chief Justice decided that the order and injunction of the court had been violated in this, that the defendants had not refrained from extending their piers or wharves into the river, beyond points on each side thereof which may be reached by ferry boats of the company of suitable dimensions, at low water. Now it is plain, I think, that after the decree ordering an injunction, the defendants did not extend their piers farther than they were when the decree was made. They were not enjoined to remove them, and the chancellor left for future decision, upon facts afterwards to appear, the precise manner in which they should be constructed so as to conform to his construction of the charter. The facts were afterwards ascertained, and the precise manner in which the works ought to be made accurately ascertained, and then it appeared, and I think the Chief Justice rightly decided, that the piers and wharves were extended beyond what was necessary for the ferry. The final decree, therefore, ordering them to abate the nuisance, was correct, but, in my opinion, the defendants were guilty of no contempt. It was not shown that they had wilfully or wantonly violated the chancellor's directions. He left the mode of proceding to their judgment, and if they erred in carrying out his instructions, and he was right in giving them, they proceeded so far at their peril, as to render their works liable to be abated; but an error of judgment in a matter very far from being apparent when they acted, was not such a viola-

tion of an explicit order as ought to subject them to an attachment.

As to the further objection insisted on, that the final decree was erroneous because it was founded on the report of two special masters who were not sworn, I think the Chief Justice gave the proper answer to it. If it be admitted that the report was informal, which I am not disposed to think is true, the facts now before the court, contained in the testimony of the witnesses taken before one of the regular masters, sufficiently sustains the decree, independently of the report itself, and it ought therefore to be affirmed.

Upon the whole, I am of opinion that the decree, so far as it orders an attachment against the defendants, should be reversed, without costs of the appeal; and that in all other respects the decree should be affirmed, with costs.

Decree affirmed unanimously.

APPENDIX.

COURT OF ERRORS AND APPEALS.

MARCH TERM, 1852.

The following opinions of the Court of Appeals are omitted in the report of the cases in 4 *Halsted's Chancery Reports*.

WILLIAM C. H. WADDELL, appellant, and EPHRAIM BEACH, respondent.

(*See* 4 *Halst. Ch.* 299 *and* 777.)

It does not belong to a court of equity to determine disputed titles to land.

In the absence of fraud or of some circumstance equivalent to fraud, there must be a trial and eviction at law, before a grantee, who has gone into possession under covenants of title and warranty, can have relief in a court of equity against his grantor, for a return of the purchase money, or of the security for it, on account of a deficiency or failure of title.

A case cannot be taken out of this principle by the fact that the party is not in the position of an original complainant, seeking the aid of the court, but is a defendant, making use of a cross-bill by way of defence; the cross-bill sets up a distinct ground of relief, upon which the complainant must make out a case or fail.

The opinion of the court was delivered by

ELMER, J. The cross-bill, filed by the appellant in this case, prays that the bond and mortgage to the appellee, and which it is the object of the original bill of the appellee

to enforce, may be cancelled, and the money paid refunded, the complainant tendering himself ready and offering to reconvey the land and premises mentioned in the deed from Beach to Waddell, clear of all encumbrances, and for such further and other relief as the circumstances may require.

It is alleged in the cross-bill that the said bond and mortgage were given to secure the payment of part of the purchase money of the said land and premises; that at the time of the conveyance to Waddell, Beach was not the rightful owner of all the premises conveyed, and that he well knew of the defect in his title; that he represented himself to be in possession of the whole of said premises, whereas, in truth, there was a considerable part of the same not in his possession, but in the possession of others, who then used and claimed, and still use and claim, the same; and that the part so in possession of others, was material and absolutely necessary to the enjoyment of the rest of said land and premises, and without which the other part is completely valueless. The answer to this cross-bill expressly denies all fraud and misrepresentation, insists that Beach was the true owner of all the premises conveyed, denies that any part thereof was out of his possession, and avers that by virtue of the said deed he delivered to the complainant full and indisputable possession of the whole of the said premises.

The deed from Beach to Waddell bears date December 3d, 1835, and contains full covenants of seizin and warranty. The consideration money mentioned in the deed is the sum of eight thousand three hundred and twenty dollars, a part of which would seem to have been paid or otherwise settled between the parties, the bond and mortgage now in controversy having been given to secure the payment of two-thirds of that sum, amounting to five thousand five hundred and forty-six dollars and sixty-six cents. At the time this deed was made, Beach's tenant appears to have been in possession of all the premises conveyed, and soon afterwards the complainant himself took possession of the whole or some part thereof; but whether he did, in point of fact, occupy the whole as conveyed to him, is disputed and does not very clearly

appear. It is sufficient, for the purposes of the present decision, to say that he has not shown by any reliable proof that any part of the premises were in the use and occupation of other persons, or that he was in any way hindered from possessing the whole. The answer of Beach, responsive to the allegations in the cross-bill, explicity denies any adverse possession, and this answer is not satisfactorily disproved. The evidence on this point is somewhat contradictory, and at best is too vague and doubtful to overcome the allegations of the answer. After the execution of the conveyance, Waddell made several payments in discharge of the mortgage debt, without any complaint, so far as appears, in regard to the title or possession. The last payment of five hundred dollars was as late as April 1st, 1838, nearly two years and five months after the sale, and two years after he had taken possession of the premises, so that he had ample time to ascertain how the fact was, and if he failed to do so, is certainly chargeable with gross neglect.

As to Mr. Beach's title to the whole of the premises conveyed at the time he made the deed, as to which it is admitted the burthen of proof is on his adversary, the evidence is equally unsatisfactory. On the one hand, it would seem that the title deeds of Beach do not cover the whole lot; while on the other hand, it is proved that several years before the sale, Mr. Beach and Ichabod Carman, who owned the adjoining property, with the friendly assistance of three of their neighbors, ascertained and fixed their boundary line as it is set forth in the deed, and that Beach afterwards occupied the premises accordingly; and there is some evidence to show that the line was then settled in accordance with the ancient possession of the respective owners. Without, however, undertaking to settle in whom the title really is, or to intimate any opinion on that point, it is enough to say that it does not belong to a court of equity to determine disputed titles to land. No allegation is made of insolvency on the part of Beach; and if it be true that there is any failure of title, Waddell has ample means of indemnity by means of the covenants in his deed. The allegations of

fraud and misrepresentation in regard to the title or possession of the property, are wholly unsupported by the proof, and were not much insisted on in the argument. Waddell has not been evicted, nor has any action been brought against him by any one for any part of the premises. The general rule undoubtedly is, that in the absence of fraud, or of some circumstances equivalent to fraud, there must be a trial and eviction at law, before a grantee, who has gone into possession under covenants of title and warranty, can have relief in a court of equity against his grantor, for a return of the purchase money or of the security for it, on account of a deficiency or failure of title. This is a safe and salutary rule, which I feel no disposition to impair. *Cooper Eq. R.* 308; 1 *J. C. R.* 213; 2 *Ib.* 519; 2 *Edw. Ch. R.* 37; 1 *Paige.* 244; 9 *Ib.* 443; 8 *Leigh R.* 659; 9 *Ib.* 556.

The counsel of the appellant, feeling the pressure of this principle, sought to take the case out of it, by insisting that Waddell was not in the position of an original complainant, seeking the aid of the court, but was in truth a defendant, making use of the cross-bill, as he had a right to do, simply by way of defence. But I do not see how his case is altered by the fact of his being a defendant in the original bill in this cause, filed on the mortgage. That bill is not exhibited to obtain relief upon circumstances, as appealing to the equitable discretion of the court, but simply to enforce a legal demand by a sale or foreclosure of the mortgaged premises. The cross-bill sets up a distinct ground of relief, upon which the complainant must make out a case entitling him to the interposition of the court, upon principles of equity, or he must fail, and leave the original claim against him in full force.

I am clearly of opinion that the decision of the Chancellor was right, and that his decree should be affirmed with costs.



BENJAMIN S. MULFORD, appellant, and JONATHAN BOWEN and others, respondents.

(4 *Halst. Ch.* 751.)

The rule that an executor, administrator, guardian, or trustee, cannot directly or indirectly become a purchaser at his own sale, is firmly established.

It is uniformly held in courts of equity, that the trustee will not be permitted to derive benefit from a purchase thus made, but that the deed will be avoided at the instance of the *cestui que trust*.

It has been held in this state, not only that the deed may be avoided in equity, but that as against the *cestui que trust* it will be treated as *void* in a court of law. The rule at law, however, is not that the deed is *absolutely void*; the extent of the doctrine is that the *cestui que trust* may avail himself of the objection at law.

Admitting the doctrine of the courts of law in its fullest extent, the trustee, in case the deed be avoided, may be entitled to equitable relief. And the equities subsisting between the trustee and *cestui que trust* cannot depend upon the tribunal in which relief is sought. The equities of the trustee cannot be defeated by the *cestui que trust* resorting to law, rather than equity, for relief.

Where the cause was retained for the purpose of final relief in equity, and nothing could be gained by permitting the party to proceed with his action at law, the injunction was continued.

On the twentieth of February, eighteen hundred and thirty-seven, the appellant and John S. Mulford, administrators of Mason Mulford, deceased, made sale of part of the real estate of their intestate, for the payment of the debts of the estate, by virtue of an order of the orphans' court of the county of Cumberland. At the vendue, the land was struck off to one Isaac Mulford, he being the highest bidder, for the sum of eighteen hundred dollars. On the first of March, eighteen hundred and thirty-seven, a deed was made by the administrators, pursuant to the sale, to Isaac Mulford. On the same day, and for the same consideration, he re-conveyed the land to the complainant.

At the July term, eighteen hundred and forty-seven, two of the heirs at law of Mason Mulford, the intestate, instituted an action of ejectment against the complainant, for the recovery of their share of the real estate thus sold and conveyed. The complainant thereupon filed his bill in equity against the plaintiffs in the action of ejectment, praying that they might be restrained by injunction from further proceeding at law, and be decreed to confirm the title of the complainant to the said real estate; or if the chancellor should be of opinion that the title of the complainant was voidable in equity, that they might come to an equitable account; that the complainant might have a lien upon the real estate for the amount of the purchase money and of all permanent improvements made by him upon the real estate, over and above the rents and profits.

An injunction issued, pursuant to the prayer of the bill. Upon hearing, the injunction was dissolved, but the bill was retained, no final decree having been made upon the merits. From the order of the chancellor, dissolving the injunction, the complainant appealed.

The opinion of the court was delivered by

GREEN, C. J. The well-settled rule in equity, that an executor, administrator, guardian, or trustee cannot directly or indirectly become a purchaser at his own sale, has not been called in question. The rule is firmly established. It rests upon clear principles. It is dictated by obvious considerations of policy. It is essential to guard at once the trustee from temptation, and the *cestui que trust* from the consequences of fraud and injustice. It is uniformly held in courts of equity that the trustee will not be permitted to derive benefit from a purchase thus made, but that the deed will be avoided at the instance of the *cestui que trusts*. In this state it has been held not only that the deed may be avoided in equity, but that as against the *cestui que trust* it will be treated as *void* in a court of law. The doctrine obtains not only where the trustee has been guilty of actual fraud, but

also in cases of construction or equitable fraud resulting from the mere purchase by the trustee of the estate of the *cestui que trust*, without regard to the *bona fides* or *mala fides* of the transaction.

It was earnestly insisted upon in argument, on the part of the appellant, that the rule at law, as adopted in this state, is inconsistent, not only with the practice of courts of law elsewhere, but with sound principle. If it were so, it would not be in accordance with the practice of a court of equity, in administering relief, to proceed upon the ground that a legal principle, long established in courts of law, was erroneous; nor could such a conclusion be of any avail to the appellant in this cause. He seeks relief in equity upon the very ground that at law his deed will be avoided. This constitutes, in fact, the equity of his bill. Without it, his relief would be complete at law, and he would have no standing in a court of equity. This bill must necessarily be dismissed.

Nor is it designed to intimate an opinion, that sitting even as a court of common law this court would be disposed to unsettle the rule that a deed made by an executor or trustee directly or indirectly to himself, may be avoided at law as well as in equity. No inconvenience has arisen, nor is it perceived that any will necessarily result from the practice. Sound policy requires that not the slightest encouragement should be given to the practice of trustees dealing in the estate of their *cestui que trusts*.

The rule at law, however, is not that the deed is absolutely void. Such expressions have no doubt been used by courts, but clearly without regard to critical accuracy. The extent of the doctrine is that the *cestui que trust* may avail himself of the objection at law, and is not necessarily driven to equity for relief. The deed is not absolutely void. It is good unless the *cestui que trust* elect to avoid it.

Admitting the doctrine of the courts of law in its fullest extent, the trustee, in case the deed be avoided, may be entitled to equitable relief. It is true that a court of law cannot adjust equities and administer relief upon equitable principles, but for that very reason the doors of a court of

equity ought not to be barred against him. Courts of law never have decided that the trustee should lose the land and the purchase money also; that the *cestui que trust* should recover the land and retain the price paid for it. They have simply avoided the purchase, and left the parties to resort to equity for relief; any other doctrine would convert a rule designed for the suppression of fraud into an instrument of fraud. In case, then, the *cestui que trusts* attempt at law to recover the estate purchased by the trustee, he may come into equity for relief. Whether he be or be not entitled to relief, will necessarily depend upon the character and circumstances of the transaction.

Nor is the relief sought by the complainant obnoxious to the objection urged by the respondent that a court of equity will never relieve a party against his own fraudulent act. The complainant is not seeking to avoid his contract, or asking to be protected against its consequences. The *cestui que trusts* seek in a court of law to avoid the contract, and recover the premises conveyed to the trustee. He asks that they may be restrained from recovering the possession of the premises, until they repay the money actually advanced, and the equities between them be adjusted. In other words, he asks the relief to which he would clearly have been entitled had the *cestui que trusts* sought to avoid the deed in equity, and not at law. Nothing can be clearer than that the equities subsisting between the trustee and *cestui que trust* cannot depend upon the tribunal in which relief is sought, and that the equity of the trustee should not be defeated by the *cestui que trusts* resorting to law rather than equity for relief. Though a court of law be incompetent to administer relief, the arm of a court of equity is not thereby shortened.

If the cause is retained for the purpose of final relief in equity, nothing can be gained by permitting the party to proceed with the action at law. The question of actual fraud cannot be tried in that suit. The jury will be instructed, in case it appear that the administrator was a purchaser at his own sale, whether he be guilty of actual fraud or not, that their verdict must be for the plaintiff. The proper mode of

taking the verdict of a jury upon the question of actual fraud, if that be desirable, would be by an issue at law. The injunction, therefore, should be continued till the cause is finally settled in equity.

No opinion can now with propriety be expressed upon the merits of the case. The appeal is solely from that part of the decree dissolving the injunction. From the residue of the decree there is no appeal. Indeed, the merits of the case do not appear to have been at all considered—certainly not decided upon by the chancellor. This court, therefore, cannot decide upon them.

The necessary parties, moreover, are not before the court, to warrant a final decree. Only two of the heirs are made parties to the bill.

The order dissolving the injunction must be reversed, the injunction continued till the further order of the court, and the cause remitted to the court of chancery to be proceeded in according to the rules and practice of that court.

Decree accordingly.

COURT OF ERRORS AND APPEALS.

JUNE TERM, 1852.

The Executors of JOHN P. QUICK, appellants, and ELIZABETH FISHER *et al.*, respondents.

(The case in Chancery is reported in 4 *Halst.* 674; and on appeal, 4 *Halst.* 778.)

As a general principle, a trustee has no power to change the character of the trust fund; and if he assume the power of converting real estate into personal, or personal into real, he acts at his peril.

If a change in the character of the fund be deemed necessary, or for the interest of the beneficiary, it should be made only with the permission and by the sanction of a court of equity.

The rule applies not only to executors, administrators, guardians of infants and lunatics, and other trustees specially constituted by law, but to all trustees, having charge of the property of others.

And if a loss has been sustained, from the trustee exceeding his authority by an unauthorized and illegal disposition of the trust funds in his hands, he is liable for the loss.

The opinion of the court was delivered by

GREEN, C. J. Peter Prall, by his last will and testament, gave and bequeathed the one-fourth part of the residue of his personal estate to his son-in-law, John P. Quick, in trust, nevertheless, for the use, benefit and support of his granddaughter, Mary Fisher, to be paid to her, the said Mary Fisher, by the said John P. Quick, as her necessities may require. Prior to the first of May, 1830, John P. Quick, the trustee, received the trust funds so bequeathed to him,



amounting to two thousand one hundred and eighty-six dollars. Of this sum, eighty-six dollars appears to have been paid to the *cestui que trust*, as it was received on the first of May, 1830. The balance of the fund, two thousand one hundred dollars, was invested in the purchase of real estate, by reason of which a large part of the trust fund is alleged to have been lost. On the sixth of February, 1835, Mary Fisher, the *cestui que trust* died, leaving six children. After the death of Mary Fisher, the real estate was sold and the trustee prepared an account of the trust fund, exhibiting the loss alleged to have been sustained by the investment. In accordance with this statement, a settlement was made by the trustee with four of the children of Mary Fisher; their respective shares of the alleged balance was paid to them, and their receipt taken for the amount so paid respectively. On the twenty-ninth of December, 1845, the trustee died, the complainants, two of the children of the said Mary Fisher, then being under twenty-one years of age.

The bill is filed by two of the children of Mary Fisher, who were under age at the death of John P. Quick, the trustee, to recover against his executors their share of the trust fund.

It is admitted that the defendants are bound to *account*. The only question is upon what principle the account should be stated. The trust fund consisted of money which was invested by the trustee in the purchase of real estate. The complainants claim the full amount of the fund with interest, deducting only such payments as have been made to the beneficiary, or for her benefit. The defendants claim an allowance for losses sustained by reason of the investment of the fund in real estate.

I deem it clear both from the answer and from the evidence, that the trust fund was in point of fact invested in the purchase of real estate. There is no reason to doubt that the investment was made in good faith for the benefit of the beneficiary. She was the daughter of the trustee. She was the wife of a man incapable or indisposed to maintain his family. She was, moreover, the mother of a family

of dependent children. The father may well have supposed, under such circumstances, that a fund specially designed for the benefit and support of his daughter would be best invested in providing a home for her and for her children. The investment was made (if not at the instance of the daughter herself) certainly at the solicitation of her husband and of his friends. The trustee had no personal interest in making the investment, nor so far as appears did he derive the least pecuniary advantage from it. On the contrary, he added to the trust fund a considerable amount of his own money in order to make the purchase and put the property in repair. The beneficiary and her children were put in possession immediately on the completion of the purchase, and they were permitted to continue in the possession and enjoyment of the property so long as the husband of the beneficiary was able to carry on his business, and immediately upon the death of the *cestui que trust* the property was sold at a sacrifice. He took the deed for the property, it is true, in his own name and not as trustee, but this he may have done either because he supposed, as appears by the evidence, that he had himself an eventual interest in the trust fund, or because a part of his own property was invested in the purchase, or because he supposed he might thus most effectually control the property as well for the interest of the beneficiary as for his own. I see nothing in the transaction to impugn in the least degree the character of the trustee for *integrity*, however much he may have erred in judgment or in the estimate of his legal rights. It appears, moreover, that every dollar of the trust fund received by the trustee prior to the determination to purchase the real estate was paid over as soon as received to the beneficiary, and that the whole balance of the fund with a large sum of the trustee's individual property, was invested in the purchase of the real estate of which, as has already been said, the beneficiary and her family for years enjoyed the entire benefit. I deem this statement due in justice to the memory of the trustee and especially as the account which was prepared by him years



after the death of his daughter, has received, and perhaps justly admits of, a harsh interpretation, affecting, to say the least, the liberality of the accountant. In considering the case it may be fairly assumed not only that in point of fact the trust money was invested in the purchase of real estate, but that the investment was made in good faith and from justifiable motives. The question remains, had the trustee the right to make such investment of the trust fund! And if he had not, then in equity, must the loss be borne by his estate or by the trust fund?

It is admitted as a general principle, that the trustee has no power to change the character of the trust fund, and that if he assume the power of converting real estate into personal, or personal into real, he acts at his peril.

While he will be suffered to derive no benefit from such change of investment, he will be held personally accountable for any loss which may ensue. While the beneficiary will be permitted, if it appear for his interest to follow the fund, through whatever changes it may pass, the trustee will not be permitted to compel the beneficiary to accept the property after the conversion, or to impose any loss which may result from the conversion upon the trust fund.

If a change in the character of the fund be deemed necessary, or for the interest of the beneficiary, it should be made only with the permission and by the sanction of a court of equity. The rule applies not only to executors, administrators, guardians of infants and lunatics, and other trustees specially constituted by law, but to all bare trustees, having charge of the property of others, and not specially invested with peculiar or extraordinary powers. Experience has shown that the rule is a wise and salutary one. The security of the fund is a primary consideration in the investment of the trust estate. The temptations to a trustee to tamper with a trust fund are so numerous and so powerful, the hopes of bettering the estate so often prove delusive, that the power of changing the character of the fund is most safely reposed in the discretion of judicial tribunals.

Nor is the rule prohibiting the change of character of the trust fund founded solely or mainly upon the consideration that the inheritance or succession to the estate is thereby affected. On the contrary, it is a well settled rule in equity, that the character of the fund will be converted from personal to real or from real to personal without regard to the succession whenever the interests of the beneficiary require it. *Matter of Salisbury*, 3 *J. C. R.*, 347.

The trustee, if the principle be correctly stated, has in this case exceeded his authority. The loss has been sustained not by an error of judgment committed by the trustee in the management of the trust fund, but by an illegal and unauthorized disposition of the trust funds in his hands. He is consequently liable for the loss.

It cannot be objected that these complainants have slumbered over their rights, or that they designedly forbore to prosecute their claim till after the death of the trustee. They were both infants at the death of the trustee, and consequently were not chargeable with laches. Nor can it be objected that they have in any wise assented to the illegal disposition of the trust fund, or ratified directly or indirectly the act of the trustee. Whatever force there may be in these objections as applied to the other children of Mary Fisher, it does not apply to these complainants.

As to the objection that the husband of Mary Fisher, as her administrator, and not her children, is entitled to this fund, and that therefore the children are in no contingency entitled to recover, it is enough to answer, if there be anything in the objection, that it is not a ground of appeal in the present case, and that the objection may be raised upon the final hearing in equity.

The decree should be affirmed.

COURT OF ERRORS AND APPEALS.

NOVEMBER TERM, 1852.

SIMON BROLASKY, appellant, and WALTERS B. MILLER and others, respondents.

(4 *Halst. Ch.* 789.)

The defence of usury in a mortgage may be set up by any one claiming under the mortgagor and in privity with him.

The acts of a mortgagor in assenting to a decree *pro confesso* upon the mortgage, in declining to set up the defence, or even in an express recognition of a usurious mortgage as valid, after his title in the mortgaged premises had been divested, and vested in others, cannot affect the rights of his alienees.

Where the equity of redemption had been sold by the sheriff, and no decree of foreclosure was necessary against the mortgagor, he was held to be a competent witness to prove the usury.

The opinion of the court was delivered by

GREEN, C. J. The bill in this cause was filed to foreclose a mortgage given by James Clark and wife to Simon Brolasky, the complainant. A decree *pro confesso* was taken against Clark and wife, no appearance having been entered, or answer filed by them. Miller and Ware, the other defendants, answered. By the pleadings, it appears that Miller and Ware hold a mortgage upon the premises subsequent to the complainant's mortgage. It also appears that the interest of Clark in the mortgaged premises, was sold at sheriff's sale, by virtue of executions at law issued upon

judgments recovered against him subsequent to the registry of the mortgages, and that Miller and Ware became the purchasers. They claim title, therefore, to the premises, as mortgagees, and also as purchasers of the equity of redemption. By their answer, they set up usury as a defence to the complainant's mortgage, and call Clark, the mortgagor, as a witness to sustain the allegations of the answer. The chancellor sustained the defence, and by his decree dismissed the bill. From that decree the complainant appealed.

Three questions are involved in the decision of the appeal, all of which have been discussed upon the argument, viz:

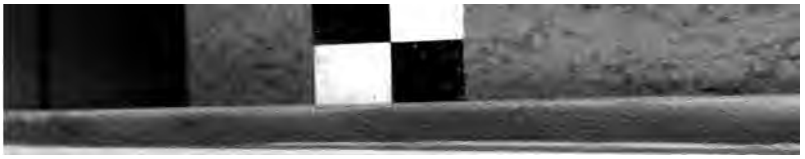
First. Can the defence of usury be set up by Miller and Ware, Clark, the mortgagor, not availing himself of that defence, but suffering a decree *pro confesso* to be entered against him?

Second. Is the mortgagor a competent witness to prove the usury?

Third. Is the usury proved with sufficient certainty to warrant the court in founding a decree upon it?

The question whether the plea of usury is personal and peculiar to the mortgagor, or whether it may be set up as a defence to a mortgage by a subsequent mortgagee, or by a purchaser of the equity of redemption, has at various times undergone consideration in the courts of this state, and it may be well briefly to trace its history.

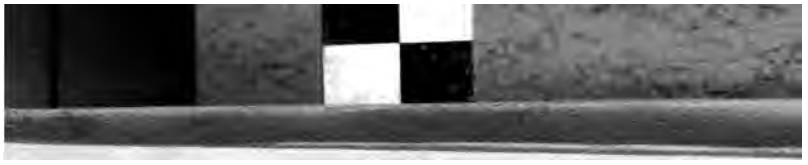
In *Ward v. Plume*, the bill was filed to foreclose a mortgage given by Cyrenius Beach and wife to the complainant, bearing date in 1811. In 1814, Beach and wife executed a second mortgage upon the same premises, to Anne Plume. The second mortgage had been foreclosed without making Ward, the first mortgagee, a party to the bill. The mortgaged premises had been sold by virtue of that decree, and Plume had become the purchaser. A bill being filed by Ward, the first mortgagee, to foreclose his mortgage, Plume, the purchaser at the sheriff's sale, set up usury as a defence. Exceptions were filed to the answer, and the master to whom the exceptions were referred, reported in favor of the mortgage. Upon exceptions filed in the report, the chancellor



(Williamson) overruled the exceptions. In concluding his opinion, the chancellor said: "It is on the authority of *De Wolf v. Johnson and others*, that I decide against the exceptions to the master's report, and which case, it appears to me, must govern the present." An appeal having been taken from this decree, at November term, 1830, the decree was unanimously affirmed by the court of appeals; Vroom, chancellor, delivering the opinion of the court. In this opinion, too, much stress is laid upon the authority of *De Wolf v. Johnson*, decided by the supreme court of the United States. "The court," says the chancellor, "are supported in their opinion by the case last cited from Wheaton. This learned and dignified tribunal there, on the same question, and in a matter directly in issue before them, held it to be perfectly established that the plea of usury, at least as far as to landed security, is personal and peculiar, and that a third person having an interest in the land cannot take advantage of the usury."

The case of *De Wolf v. Johnson*, was decided by the supreme court of the United States, at February term, 1825. (10 *Wheat.* 367.) In that case, Prentiss having executed a mortgage to De Wolf to secure the payment of sixty-two thousand dollars, conveyed the mortgaged premises to William T. Barry, in trust, subject to the mortgage debt. Barry sold the premises at auction to I. Johnson and R. M. Johnson, subject to the incumbrance of any previous mortgage, and particularly the mortgage of De Wolf. Prentiss, the mortgagor, Barry, the trustee, and the Johnsons who purchased the equity of redemption, were all made defendants to the bill of foreclosure. Prentiss, the mortgagor, filed no answer, but suffered a decree *pro confesso*. Barry and Johnson set up the defence of usury. Mr. Justice Johnson, in delivering the opinion of the court, said: "It is perfectly established that the plea of usury, at least so far as to landed security, is personal and peculiar, and however a third person having an interest in the land may be affected incidentally by a usurious contract, he cannot take advantage of the usury." And again, he said: "Had the Johnsons pur-

chased from Prentiss in the most absolute and general manner, and altogether without notice, actual or constructive, they still could have acquired no more than the equity of redemption, and that would not have transferred to them the right of availing themselves of the plea of usury." This authority, clear and express, emanating from the highest judicial tribunal known to our law, and uttering the unanimous opinion of the court, naturally and properly controlled the views of our state courts. The chancellor manifestly, and it would seem from his opinion, with some hesitation, deferred to its authority. Had the federal court adhered to its opinion, expressed in *De Wolf v. Johnson*, it is not probable that the question would speedily have been re-opened in the courts of our own state. But in January, 1830, five years after the decision in *De Wolf v. Johnson*, the question again came before the United States Supreme Court, in the case of *Lloyd v. Scott*, 4 *Peter's* 205. In that case, the plaintiff brought an action of replevin to recover certain goods seized by the defendant as a distress for the rent of certain houses and lots owned by the plaintiff in Alexandria. The defendant avowed the taking as bailiff of the owner of certain ground-rents charged on the plaintiff's land by virtue of a deed for that purpose made prior to the conveyance of the land to the plaintiff. The defence was that the deed under which the ground-rent was claimed was void, as founded on a usurious contract, and the question was whether the purchaser of land, subject to a ground-rent, could set up against the claim for rent usury in a contract made by a former owner of the land. The court held that the defence might be set up by the purchaser. They further held that the question whether the purchaser of an equity of redemption can show usury in a mortgage to defeat a foreclosure was not involved in the case of *De Wolf v. Johnson*, and they virtually overturned the prior decision upon that point. The decision in *Lloyd v. Scott*, was made a short time prior to the decision by the court of appeals of *Ward v. Plume*, but the case was not referred to by the court, or by counsel, upon



the argument, and it probably escaped the attention of the chancellor.

In 1833, the question was again brought before the court of chancery of this state, in the case of *Sears v. Roberts and Ogden.* The bill was filed to foreclose a mortgage given by Roberts to Sears. Roberts subsequently conveyed to Ogden, taking a mortgage on the premises for a part of the purchase money. The chancellor (Seeley) held that upon the evidence the mortgage was not usurious, expressing no opinion upon the right of the purchaser to avail himself of the defence. From this decree Roberts and Ogden appealed. The court of appeals reversed the decree of the chancellor, by a vote of ten to four, the then chancellor (Vroom) voting for reversal, and decreed the mortgage void for usury. The question whether the purchaser of the equity of redemption could avail himself of the usury as a defence to the mortgage was fully discussed, and the authority of *Lloyd v. Scott* relied upon by counsel in argument, as virtually overturning the authority of *De Wolf v. Johnson*, and also of *Ward v. Plume.* In this case, Roberts, the mortgagor, after conveying the premises to Ogden, took a mortgage thereon from his vendee. He was therefore made a party to the bill, and joined in the defence of usury. Whether this fact operated upon the mind of the court, or whether they desired directly to overturn the case of *Ward v. Plume*, does not appear, as no opinion was delivered. The late chancellor, (Halsted,) who was counsel for Sears, understood the decision of the court of appeals in that case as establishing the principle that the purchaser of the equity of redemption may set up usury as a defence to a mortgage given by his vendor. In the recent case of *Cummins v. Wire*, (2 *Halst. Chan. R.* 88) he adopted the principle, as *res adjudicata*, upon the authority of *Sears v. Ogden.*

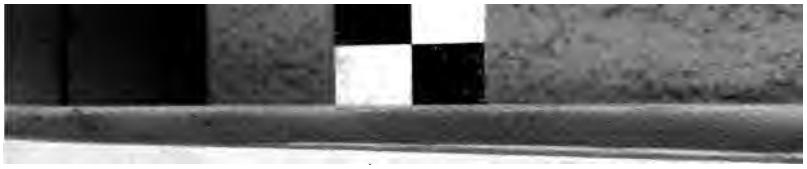
It is insisted, however, that the question is still an open one in this state, and the court are called on to decide it in accordance with sound principle. The statute declares that all mortgages upon which usurious interest is reserved or taken, "*shall be utterly void.*" It would seem, at first view,

that a contract which the statute pronounces utterly void, cannot be available for any purpose, either against the party injured or against any other person whatever.

But it is a settled rule of law, that where a statute makes void any legal solemnities, the construction of the law *is*, not that the contracts shall be deemed perfect nullities, but that they are voidable by the parties prejudiced by such contracts. 5 *Coke* 119, *Whelpdale's Case*; *Buller's N. P.* 224.

In *Carter v. Claycole*, 1 *Leonard* 306, (32 and 33 *Eliz.*) the plaintiff, in an action of ejectment, claiming title to the premises, by virtue of a lease from the Wardens and Fellows of All Soul's College. The jury, by a special verdict, found that the lease was made to the plaintiff, but it was not found that any rent was reserved thereupon. The statute 13 *Eliz. Cap.* 10, (then in force,) declared that all leases made by the master and fellows of any college, of any houses or lands belonging to the body corporate, other than for twenty-one years, whereupon the accustomed yearly rent, or more, shall be reserved, payable yearly during the term, shall be utterly void and of none effect, to all intents, constructions, and purposes. But all the justices agreed that such lease was not void as against the grantors, but against those only who were designed to be protected by the statute. That the lease was not void, but voidable and to be avoided by the college or any other who claim by it. And in that case, Mr. Justice Perriam, by way of illustration, as if stating an undoubted principle, said: "A mortgages lands to B, upon a usurious contract for one hundred pounds, and before the day of payment, B, the mortgagee, is ousted by C, against whom B brings an action. C cannot plead the statute of usury, for he hath no title. For his estate is void against the mortgagor."

The principle of the ancient authorities upon this point is simply this, that although the statute declares a mortgage founded on a usurious contract utterly void, it nevertheless is voidable only by the mortgagor or those claiming under him and invested with his rights. It cannot be avoided by a stranger or a mere disseizor. This principle remains un-



shaken at the present day, and to it nearly all the authorities, however apparently conflicting in reality, conform. It is, in fact, the touchstone by which every decision upon this subject may be tested, and its soundness determined. It results that not only the mortgagor may avail himself of the defence of usury, but that a subsequent mortgagee or grantee of the estate mortgaged, who is seized of the estate and vested with the rights of the mortgagor in the land, may in like manner avail himself of the same defence, and for the same reason the purchaser of the mortgaged premises at a sheriff's sale, under a subsequent mortgage, or upon an execution at law may also avail himself of the defence. He is possessed of all the rights of the mortgagor, and upon the same principle the mortgagor may divest his grantee of the right to avoid the mortgage for usury. He may himself waive his right of defence. He may convey the land in express terms, subject to the usurious mortgage, and in such case the purchaser does not stand *quoad hoc* in the shoes of the mortgagor.

Thus in *De Wolf v. Johnson*, Prentiss, the mortgagor, conveyed to Barry, and Barry sold to Johnson, with an express recognition of the mortgage of Prentiss. The grantee, in fact, by the express terms of the grant, took title, only subject to that mortgage. The mortgagor recognized the validity of the mortgage, waived his right to avail himself of the defence of usury, and avoided a transfer of that right to his grantee. The decision of the court upon the facts of the case was right, and in conformity with sound principle. The error consisted in a mis-statement of the true ground of the decision.

So in *Green v. Kemp*, (13 *Mass.* 515) the mortgagor had released and quit-claimed to Kemp (the tenant) all the right in equity of redeeming which he had in the premises. There was but the one mortgage upon the premises. It was held that a usurious mortgage is void only as against the mortgagor and those who may lawfully hold the estate under him. A purchaser of the mere equity of redemption cannot avoid the mortgage by plea or proof of usury.

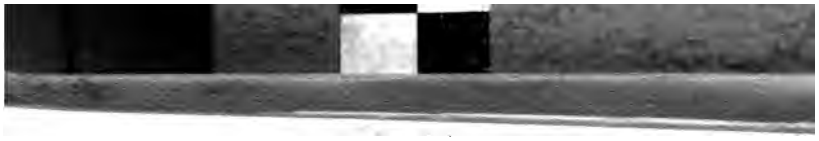
The more recent American cases both at law and in equity, recognize and adopt the principle of the ancient authorities. A mere stranger cannot set up usury in avoidance of a mortgage to which he is neither party nor privy. Nor can the purchaser of a mere equity of redemption in premises covered by a usurious mortgage, who purchases subject to the lien of such mortgage, set up usury as a defence to the incumbrance. But the defence of usury in a mortgage may be set up by any one claiming under the mortgagor and in privity with him. *Trench v. Shotwell*, 5 *John. C. R.* 555; *Pearsall v. Kingsland*, 3 *Edwards* 195; *Post v. Dart*, 8 *Paige* 640; *Shufelt v. Shufelt*, 9 *Paige* 137; *Dix v. Van Wyck*, 2 *Hill* 522; *Morris v. Floyd*, 5 *Barbour* 130; **Brooks v. Avery*, 4 *Comstock* 225.

Conceding the principle that a usurious mortgage may only be avoided at the instance or for the benefit of the mortgagor, it is obvious, in order to carry out the principle, that it must be voidable also at the instance of his alienee. Otherwise the usurious mortgage must operate to the prejudice of the mortgagor, and constitute a valid incumbrance on the land, inasmuch as he is virtually disabled from conveying except subject to the mortgage. So if the land subject to a usurious mortgage be sold at sheriff's sale, the usurious mortgage necessarily operates to the prejudice of the mortgagor, unless the purchaser may avoid the incumbrance.

Upon principle, as well as upon authority, Miller and Ware may set up usury as a defence to the mortgage given by Clark to the complainant. Nor can the acts of Clark, in assenting to a decree *pro confesso* upon the mortgage, in declining to set up the defence, or even in an express recognition of the usurious mortgage as valid, after his title in the mortgaged premises had been divested and vested in others, affect the rights of his alienees.

Second. Clark, the witness, had no interest, at the time of his examination, in the mortgaged premises. The equity of redemption had been sold by the sheriff; no decree of foreclosure was necessary as against him, nor could any decree

*See also *Sands v. Church*, 2 *Selden* 347.



be made against him for costs. The decree against the mortgage, procured by his testimony, could not avail him in an action upon the bond. As between the complainants and the subsequent incumbrances, he stood indifferent. He was, therefore, a competent witness. *Cummins v. Wire*, 2 *Halst. Ch. R.* 88; *Post v. Dart*, 8 *Paige* 640.

Third. Upon the third point I concur in reversing the decree, upon the ground that the charge of usury is not satisfactorily made out by the evidence.

COURT OF ERRORS AND APPEALS,

JUNE TERM, 1853.

REUBEN H. FREEMAN and MARGARET, his wife, appellants; and ISAAC STAATS, respondent.

(*See* 4 *Halst. Ch. R.*, 814.)

Where a bill is filed to avoid a conveyance on the ground of incapacity by reason of extreme intoxication at the time of making, and charges that a deed, note, and warrant of attorney, were procured by fraud, covin, and misrepresentation, and the charges are fully, distinctly, and unequivocally denied by the answer, the rule of law requires that they should be clearly proved, and not left to presumption or conjecture.

The circumstance that questions of fact involved in the cause have been passed upon by a jury, constitute no insuperable objection to the interference of this court. The office of a jury in a court of equity is not definately and finally, as in a court of law, to settle questions of fact, but simply to inform the conscience of the chancellor where he has doubt.

The fact that an issue has been awarded, and a verdict of a jury rendered in the cause upon which the decree of the chancellor is based, does not take away or limit the control of this court over the decree.

The opinion of the court of appeals was delivered by

GREEN, C. J. On the 2d day of September, 1842, Isaac Staats, the complainant in this cause, conveyed by deed duly executed, to his daughter Margaret, the wife of Reuben H. Freeman, in fee, certain real estate in the county of Somerset. On the same day Staats gave to his son-in-law, the said Reuben H. Freeman, his note for one thousand six hundred dollars, with a warrant of attorney to confess



judgment, upon which note judgment was subsequently entered. To avoid the conveyance and judgment thus made and entered, this bill was filed.

The bill charges that at and before the execution of the deed, the complainant was in the habit of drinking ardent spirits to intoxication. That soon after the second marriage of the complainant, the defendant and his wife insinuated to the complainant and others, that the complainant's wife was unfaithful to her marriage vows; that her character was bad; and that she would strip the complainant of all his property. That these charges were false and unfounded, and that they were made for the purpose of inducing the complainant to convey his property to the defendant and his wife.

The bill further charges that the deed and note were executed while the complainant was in a state of gross intoxication, and with the idea impressed upon his mind by the defendant, that his wife would ruin him. That at the time the papers were executed, the complainant had not power of mind to comprehend their contents and effect; that they were not executed of his own notion and free will, but by the suggestions, compulsion, or contrivance of Freeman and his wife, or one of them.

The material charges of the bill are:

First. That the defendant at the time of the deed and warrant of attorney was incapable, by reason of extreme intoxication, of making or of assenting to any conveyance.

Second. That the deed, note, and warrant of attorney, were procured by fraud, covin, and misrepresentation.

Both charges are fully, distinctly, and unequivocally denied by the answer. The proof of them rests upon the complainant. The rule of law and the dictates of justice require that they should be clearly proved, and not left to presumption or conjecture.

The case is essentially a question of fact, resting upon the weight of evidence in the cause. It is unnecessary to review it in detail. There are a few facts which are mate-

rial in weighing the evidence, and which give character to the case.

First. The charge of fraud as made in the bill and as attempted to be established in evidence rests solely on charges and insinuations made by the defendants against the character of the complainant's wife, by which the mind of the complainant was influenced against her, and he induced to execute the deed and to give the judgment under an apprehension that his wife would ruin him. Whether these charges are true or false is not very material. There is certainly enough in the evidence to excite and justify the worst fears and suspicions of a husband. But whether true or false it is clearly proved that they originated not with the defendants, but with the complainant himself, not after, but before his marriage, and that his conviction of their truth was so strong as to induce him to charge openly the illegitimacy of the issue of his marriage.

In regard to Mrs. Freeman, the daughter of the complainant, to whom the deed was made, and for whose benefit it chiefly enures, there does not appear to be the shadow of evidence for the charges preferred against her in the complainant's bill. There is no pretence in the evidence that she ever uttered a charge against the character of Mrs. Staats, or that she participated in any way in the procurement of the deed. Her conduct in the painful and trying situation in which she was placed, so far as appears in evidence, was not only free from all suspicion of fraudulent practice, but from aught inconsistent with filial respect and affection. So far as she is concerned, the charge of fraud preferred in the bill has utterly failed. There is nothing in the evidence as against her to justify a suspicion of fraud practiced or meditated.

In regard to Freeman himself, it is certain that he did not *originate* the charges against the complainant's wife, and that he ever *repeated them* for an improper purpose or with a corrupt motive, is by no means clear from the evidence. It is shown indeed that they were on one occasion reduced to writing by him; but it does not appear for what purpose

that memorandum was made, nor does it even appear, except by the complainant's own allegation, that it was ever seen by him prior to the execution of the deed. And when it is remembered that charges of the most aggravated character had previously been made by the complainant himself against his wife—that he had previously separated from her and attempted to procure a divorce from her on these very grounds—there would seem no sufficient reason to suppose that the memorandum, at the time it was made, even if seen by him, could have seriously operated upon the defendant's mind, much less that it should form the basis of avoiding a solemn conveyance on the ground of fraud and misrepresentation. There is no sufficient evidence to avoid the deed on the ground of fraud or misrepresentation.

Second. It is in evidence, that the complainant at and before the execution of the deed was a man of very intemperate habits, and there is evidence in the cause that on the day the deed was executed, he was to some extent under the influence of intoxication. In regard to the degree of his mental capacity on that day, there is some conflict in the evidence, and room for a diversity of opinion. Had the idea of the deed originated and been consummated upon that day, there would have been some ground for the charge that the defendant had not power of mind clearly to comprehend the contents and effect of the conveyance.

But the deed was not prepared or executed hastily. The complainant, long before the date of the deed, had applied to the counsel who was in the habit of attending to his business, to prepare the deed for him. He was advised to reflect upon it. He called again upon his counsel some days before the execution of the deed, and told him that his mind was made up respecting it. A day was appointed for the transaction of the business. Early on the morning of that day he informed a friend of his purpose, and on being advised not to act hastily replied that he had thought of it and concluded to do it. The papers were even prepared and executed at the defendant's own house, when surrounded by his family. The deed was read and witnessed by his sister,

who testifies to his capacity. The papers were all prepared by and executed under the advice of experienced counsel, who had long known the complainant well, and had been in the habit of transacting his business. The deed was acknowledged before him as a master of the court of chancery. Few persons had better opportunity of knowing and judging of the complainant's mental capacity. No one was called upon so imperatively to judge respecting it. He testifies to the capacity of the complainant. The fact that the deed was executed under his direction, and acknowledged before him as an officer, afford, indeed, the clearest evidence of his estimate of the complainant's capacity at the time of their execution.

Eight days after the deed was executed, the complainant, in accordance with an arrangement made at the time of its execution, gave directions to have it recorded.

On the seventh of September, five days after the execution of the deed and the giving of the warrant of attorney to confess judgment, the sheriff of the county called to levy the execution issued upon the judgment. On that day the sheriff testifies that he would have been willing to have bought or sold or transacted any ordinary business with the complainant. He showed the sheriff his property, gave it up to him, and appeared to understand perfectly what he was about. The transfer of the complainant's property on the second of September, 1842, to his daughter and son-in-law, appears by the evidence to have been previously contemplated and deliberately resolved upon; to have been consummated with the knowledge and approbation of his own sister, by the aid of experienced counsel, and to have been subsequently recognized and approved by the complainant himself.

It appears, moreover, that the management of his affairs, and the disposition of his property, had always been in his own hands and under his own control, and that but a few months previous to the execution of the instrument now sought to be avoided, he had conveyed by a lease for ninety-

nine years, a part of his real estate, in trust for the purposes of a public school.

The decided weight of evidence, as it appears before this court, is that the complainant was not, at the time of the execution of the deed, incapable by reason of intoxication or otherwise, of comprehending its contents and effect.

Circumstances have since transpired which may render it desirable that the conveyance should have been made upon other conditions and with different provisions. But subsequent events cannot affect the validity or *bona fides* of the transaction. At the time of its execution, and under the circumstances in which the testator was placed, the transfer of the property was neither unnatural nor so unreasonable as to raise any presumption against its validity. The conveyance of his real estate was made to his only daughter—the only child of his first wife. It contains ample provision for his own support for life. The dower right of his present wife remains unimpaired. It may well be doubted whether if he had retained his property under his own control, either he or the children of his second wife would have been in a better pecuniary condition than they now are. The property was placed, by the act of the complainant, where the law itself would place it, beyond the reach of his own improvidence.

The circumstance that questions of fact involved in the cause have been passed upon by a jury, constitute no insuperable objection to the interference of this court. The office of a jury in a court of equity is not definitely and finally, as in a court of law, to settle questions of fact, but simply to inform the conscience of the chancellor where he has doubt. *Hubback on Succession* 56. The fact that an issue has been awarded, and the verdict of a jury rendered in the cause upon which the decree of the chancellor is based, does not take away or limit the control of this court over the decree.

The decree of the chancellor must be reversed, and the cause remitted to the court of chancery, to be proceeded in according to law and to the rules and practice of that court.

In pronouncing this decree, it is not the intention of the court to preclude the chancellor from a further investigation of the facts of the case, either by a jury or in such other mode as he may deem advisable.



INDEX.

A.

ACCOUNT.

A master was directed to take an account of the waste, spoil, and destruction, if any, committed or suffered on the premises, while the defendant, or any person claiming under him remained in possession. *Held*, that he would not have been authorized to go behind the decree to consider equities existing between the parties, which would entitle the plaintiff to any but the ordinary rule in taking the account; those equities are for the consideration and determination of the chancellor. No special directions having been given in the decree, it was the plain duty of the master to follow the ordinary rules in taking the account. *Izard v. Bodine.* 309

AGREEMENT (PAROL.) See *Deed.*

ADMINISTRATOR. See *Executor.*

ADVANCEMENT.

As such, never draws interest. *Black v. Whitall.* 572

ADVERSE POSSESSION.

Water was diverted by the owner of two dwellings, for the use of his two dwellings, one above and the other below a road. He used the water for twenty three years, and died. Commissioners appointed by the orphans' court to make partition, by order of the court, sold and conveyed the land below the road to the complainant. It was held that no adverse possession could begin till the severance of the title by the commissioners.

AMENDMENT. See *Pleading*, 11.

ANSWER. See *Practice Pleading*.

APPEAL.

1. The language of the seventeenth section of the act to prevent frauds by incorporated companies, (*R. S.* 135,) giving the right of appeal to any person or persons who should think himself or themselves aggrieved by the proceedings of the receivers appointed under the act, is very comprehensive, and would seem to have been adopted for the purpose of embracing every question which could possibly be brought before the receivers for their action.

And the right of appeal is not confined to a creditor who has a naked claim against the company, but extends to questions where a set-off is involved. *Jackson v. People's Bank.* 205

See *Frauds by Companies*, 3.

2. *Quere.* Whether an order refusing to dissolve a temporary injunction pending the suit be properly the subject matter of appeal. Some of the authorities deny that the order *where costs are not allowed*, can be the subject of appeal, and that even where costs are allowed, the order upon appeal will be reviewed only upon the question of costs. *Fleichman v. Young.* 620

3. The granting or refusal of the temporary injunction during the pendency of the cause, was a matter of discretion with the chancellor. It concluded no right of the parties, or of either of them. The order is in no sense a final order; costs are not adjudged. It is not an order from which an appeal will properly lie.

An order of the chancellor, refusing a preliminary injunction, is appealable where the appellants *are aggrieved* by it—where it touches the merits of the question in the cause—where it is the refusal of a present relief against a present mischief. So where an injunction is the primary object of the bill—where the complainants, if entitled to any relief, are entitled to this—where upon the case made the nuisance complained of is a wrong done to them, and this is the means of restraining it—and where if a nuisance at all, the act complained of is a pre-

sent existing continuing nuisance, the appeal is not liable to be dismissed.

There can be no appeal from an order of the court of chancery directing process to bring in the parties to answer for an alleged contempt. It cannot be said that the party *is aggrieved* by such an order.

Where the order has been executed, the object attained, and there is nothing upon which a judgment of reversal could operate, the appeal will be dismissed. *Coryell v. Holcombe.* 650

4. A decree which does not dispose of the whole merits of the cause, but leaves important questions for further examination and the future judgment of the court, is not a *final decree* within the meaning of the act, which requires that "all appeals, except from final decrees, shall be made within forty days after filing the order or decree appealed from. (*R. S.* 921, § 80.) *Newark Plank Road Co. v. Elmer.* 754

ASSIGNMENT.

1. If a debtor makes an assignment for the benefit of his creditors, such assignment must be in conformity to the statute. He has no right to give a preference of one creditor over another, nor has he a right to annex to such assignment a condition which contravenes any provision of the statute.

The assignee cannot protect the property from the debtor's creditors, by virtue of such an assignment. If an assignment is made *for the equal benefit of the creditors*, the assignee must proceed to discharge its trusts in conformity to the provisions of the statute.

But where, at the request of some of the creditors, the books of account, notes, &c., were placed in the hands of a responsible person *to collect*, and for no other purpose, such an assignment was held to be no more than a power of attorney. It did not place the property beyond the control of the debtor; it created no right between the assignee and the creditors. There was nothing illegal in such assignment, nor could it prejudice the creditors. *Brown v. Holcombe and Reading.* 297

2. A., assigned to B., a decree and all the rights, powers, and equities, appertaining to the same, as fully as they were possessed by himself, with au-

thority to collect the same in his name, &c. B. agreed to pay, on the execution of the agreement, a specified portion, and the remainder in one year. For the purpose of securing the last payment it was agreed that A. should hold a lien upon the decree, as fully and as perfectly as though the same had not been assigned, and in the event of the non-payment of the said last mentioned sum, A. should have the power to proceed to collect the same upon the decree, giving B. thirty days notice; and if upon the sale, the premises should produce more than the last mentioned sum, such excess was to be paid over to B.

Held, that B. had no authority, under the agreement, to collect the money as the attorney of A., and discharge the decree. *Hud. Man. Co. v. Elemendorf.* 478

3. The assignment of a lease is properly the transfer of the interest of the tenant. *Potts v. The Tren. W. P. Co.* 592

4. The assignment in this case from Elizabeth Hait to Thorn, held not a case of bargain and sale; and therefore not within the rule that gross inadequacy is sufficient to avoid a sale.

Held, that the facts proved do not make out a case of fraud or imposition in procuring the assignment.

Held, that the proofs do not establish that Elizabeth Hait was of imbecile mind at the time of executing the assignment. *Gifford v. Thorn.* 702

ATTACHMENT. See *Fraud*, 1, 6.

Where the defendants violate an injunction, an attachment will issue against them for contempt. But when it did not appear by the evidence how far the works were required to be altered to conform to the order, nor to what extent the injunction had been violated, the matter was referred to one of the Masters to ascertain and report before the attachment should issue; and an order to abate any part of the works of the defendants was denied. *Newark Plank Road Co. v. Elmer.* 754

An error of judgment in a matter, far from being apparent, is not such a violation of an explicit order as ought to subject a party to attachment. *Ibid.*

B.

BEQUEST. See *Will*, 8.

BONDS.

Coupon bonds payable to bearer, although not negotiable under the law merchant as bills and notes, are instruments of *a peculiar character*, and being expressly designed to be passed from hand to hand, and by common usuage actually so transferred, are capable of passing by delivery so as to confer a complete title in the possessor. They are the subject of pledge. *Morris Canal v. Fisher.* 667

C.

CONTEMPT.

See *Practice. Injunction.*

CONVERSION. See *Will.*

CONVEYANCE. See *Deed.*

CREDITOR. See *Debtor and Creditor. Fraud*, 1, 6. 7. *Judgment*, 1. *Corporation*, 4.

CORPORATION.

1. When a board of directors or a majority of stockholders, deviate from the originally contemplated undertaking, the "rights" of other and dissenting stockholders are "affected;" as against them they cannot legally do it. *Kean v. Johnson.* 401

A majority of stockholders in a prosperous corporation, cannot at their own mere caprice, sell out the whole source of their emoluments and invest their capital in other enterprises, where the minority desire the prosecution of the business in which they had engaged. The contract is, that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes. *Ibid.*

Where the duration of such employment is limited in the charter, until that time it must continue so employed, unless, perhaps, in case of clear loss. If no time is fixed by the charter, at which the pro-

posed use of the capital shall cease, the contract is that so long as the affairs of the company are prosperous it shall go on, unless all consent to the contrary. *Ibid.*

"How far, under what circumstances, and upon what application a court of equity would restrain a corporation from an improper alienation of its property, must depend upon the general principles which guide it in the exercise of its powers; but in a proper case made, it would interfere to prevent a disposition of its property *for other than corporate purposes*. *Ibid.*

"It is the right of a partner to hold his associates to the specified purposes, whilst the partnership continues." *Ibid.*

In the enacting section of the charter of a railroad, the words "And they and their successors by the said name and style shall be capable of purchasing, holding, and *conveying*, any lands, tenements, goods and chattles whatever, necessary and expedient to the objects of this incorporation," only authorize property to be sold and conveyed away, when it is necessary or expedient to *the objects of the incorporation*. The *objects of the incorporation* cannot require that the necessary source of its profitable existence should be sold and conveyed away.

A supplement to the act of incorporation of a railroad company, authorizing the company to purchase the road constructed by another company, and declaring that the purchased road should become a part of the road authorized to be constructed by the charter, contained a proviso: "That nothing *in this act* contained shall in any wise affect *any right whatever*, either at law or in equity, *of any stockholder*, or other person in, or any claim or demand against the company, whose road it was contemplated to purchase. *Held*, that the purchase authorized by the supplement, did affect the rights of the stockholders in the company, whose road was to be purchased. And that the legislature intended, when they provided that nothing in that *act* contained, should in any wise affect *any right whatever*. that such purchase should not occur, without that which alone could

prevent its affecting such rights, viz: the consent of every stockholder. *Ibid.*

Quere—Whether a supplement authorizing any deviation from the original charter and not requiring the consent of all the stockholders, is unconstitutional? *Ibid.*

Where the company whose road was purchased under the above supplement, and who were not a *necessary* party to any of the different *kinds of relief prayed*, had not been made a party to a bill filed by one who was a protesting stockholder, against the directors of both roads, and the company in possession of the road, and all its property but the franchise; and the objection was not taken until the hearing of a general demurrer to the equity of the bill. The court disposed of the case on its merits, without requiring such formal parties to be joined. *Ibid.*

2. Where the charter of a company required five managers to constitute a quorum, and there were but four present when a resolution was passed, authorizing the execution of a mortgage, the mortgage, is null and void, from the fact that it never received the sanction of the board of directors. *Holcombe v. The N. H. Del. Bd.*, 457.

See *Fraud by Incorporated Co's.*

3. One who had waived his right to have commissioners called, and permitted a corporation to take possession of his land without first making compensation, or pursuing the mode prescribed by the act to ascertain it; and permitted them to change the character of the property, expend large sums of money upon it, and constitute it a part of an extensive and valuable public improvement, cannot recover the possession of the land, upon paying for the improvements. The only relief the court will afford, is to give him compensation for his land, and remuneration for all damages; and this may be ascertained either by reference to a master, or the intervention of a jury. *Trenton Water Power Co. v. Chamber.* 471

4. Subscribers to the stock of a manufacturing company put in at a valuation as assets of the company, a cotton mill, &c., receive the stock of the company therefor, and dispose of the same as their own. The company take possession of the mill

and use it for several years; no conveyance by deed is made to them—a mere memorandum of the transaction being made on the journal of the treasurer.

Held, that when the consideration for the property was received, its former owners became mere trustees of the company, and held the title for the company. Any conveyance made by them subsequent to that transaction, though for a full consideration to a grantee with notice, would be void against the company.

A judgment creditor at best stands in no better situation than such a grantee. *N. E. Man. Co. v. Van Dyke.* 498

5. The directors of an incorporated company cannot speculate with the funds or credit of the company, and appropriate to themselves the profit of such speculation. They cannot, in making sales, or purchases for the company, take advantage of their position as directors, and either directly or indirectly, speculate upon the company.

If such a transaction has involved a complainant in a law suit, there is no propriety in his appealing to a court of conscience to give him redress, which he is not entitled to by the strict rules of the common law. *Redmond v. Dickinson.* 507

6. The slight but unavoidable obstruction of public rivers by a railroad company under the authority of their charter, is a necessary evil which must be borne for the sake of the public good which demands it. *Att'y Gen'l v. Hud. R. R. R.* 526

That which would otherwise be a nuisance if done under authority of law for the public good, is justifiable. *Ibid.* 526

7. The act of 15th of February, 1844, entitled "An act to relieve the creditors of The Trenton Delaware Falls Company." by which the receivers who had been appointed by the court were authorized to sell the real estate, franchises, and works of the said company free and clear of all incumbrance, and providing that nothing in the act contained should be construed to affect the rights of the creditors, or to invalidate any existing lease made by said company, *or assignment thereof*, is a constitutional and valid act. It was designed to be in aid of the creditors of the company, not to invali-

date any contracts, but to enforce them—not to impair any securities, but to aid in obtaining the benefit of them.

The assignment of a lease is properly the transfer of the interest of the tenant. The reason and spirit of the law, no less than its language, requires *that the assignment of leases* should be construed to refer to the transfer of the rights of the tenants, and not to a mere assignment of the rent. Upon this interpretation the act is constitutional.

A company authorized to draw water from a river, and owning the race-way and the land upon which it was constructed, have the right to the use of the water flowing over their land through their race-way, as incident to the ownership of the lands, as in fact a part of the land itself; and in such case, neither is the rent of the water, nor the right to receive and demand it, a franchise. *Potts v. Trenton Water Power Co.* 592

8. Two railroad companies were incorporated to complete two independent lines across the state. No route was prescribed to either other than the termini. There was no conflict of routes on the face of the charters, and no necessary conflict in carrying out the objects of the charters.

Held, that the prior right attached to the company which first actually surveyed and adopted a route and filed their survey in the office of the secretary of state.

That as no specific route was granted to either company, a right to no particular place accrued to either until they had selected or determined upon a location. That no importance should be attached to the fact that the charter of one company was passed seven days before that of the other.

The mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

By adopting and filing a survey of their route, a company acquires a right to obtain the lands over which it passed; and they cannot be deprived of that right by another company purchasing and taking deeds for those lands, even if made without notice.

Such conveyances could at most put the purchasers in the condition of land owners, liable to have their

lands taken, upon making compensation. *Morris and Essex v. Blair.* 635

9. By the eighth section of the act incorporating the Newark Plank Road and Ferry Company, the company are authorized to construct a plank road, to commence in the city of Newark, east of Broad street, and thence, passing by the most convenient and direct course, to the bank of the Passaic river, near the old ferry, and across the meadow between the Passaic and Hackensack rivers, and through the county of Hudson, in the most eligible route, to its point of termination in said county and opposite the city of New York; and that it shall be lawful for the said company at any time to drive piles and erect or build piers, wharves, platforms, ferry stairs, or other works necessary for the said road and ferries thereon in the said Passaic and Hackensack rivers; provided always, that the free and uninterrupted navigation of vessels in said rivers, or either of them, is not thereby prevented by any bridge or other obstruction, in any manner whatever. The eleventh section provides that the company shall keep and maintain two good and sufficient ferry boats at the respective ferries on each of the said rivers, and shall cause lamps to be put up at the extreme point of each pier at said ferries, which shall be lighted before dark every evening, and kept lighted until daylight next morning. After the company had driven piles and indicated the distance to which they intended to project piers into the river, a bill was filed, praying an injunction restraining the said company from projecting piers, &c., into the Passaic river, and from obstructing the free navigation of said river. *Held*, that the act gives the company the right to extend their works *beyond the banks of the river;* that the language of the proviso assumes that the works authorized will be an *obstruction* to the river, but provides that no *such obstruction* shall be built or erected as would prevent the free and uninterrupted navigation of vessels in the river. *Newark Plank Road Co. v. Elmer.* 754

As the plan of the company, mentioned in the bill and answer, and upon which they were proceeding to construct their works in and over the river, extended into the river to the obstruction of naviga-

tion, beyond *what was necessary for the purposes of and contemplated by the act of incorporation*, an injunction was allowed, restraining the defendants from constructing their works upon that plan.

Held, that if the contemplated plan would occasion an obstruction to the navigation of the river, *beyond what the charter authorized*, the works would be a nuisance. *Ib.*

Every erection in a navigable river, which obstructs or hinders the navigation, is a nuisance. *Ib.*

It is well settled that grants of this nature are to be construed strictly, and not extended beyond what is *reasonably necessary* for the purpose the act contemplates. *Ib.*

The issue made is that the piers were proposed to be built *as the charter authorized*, and would not prevent the free and uninterrupted navigation to any greater extent than was intended by it. The question is as to the meaning of the charter. It is too plain to admit of a reasonable doubt, that independent of the charter, they would constitute a nuisance. *Ib.*

COVENANT.

1. It would seem that a tenant may ask the aid of this court to prevent his landlord from breaking a covenant which, though not made with the tenant, will work a forfeiture of his estate.

It does not follow that because a suit at law cannot be maintained on such a covenant, a court of chancery may not protect the rights of parties under it.

It is no breach of a covenant which prohibits the erection of a forge or furnace *for the manufacturing of iron*, or the erection of any building for any such purpose, to erect buildings in which forges for the purpose of *heating iron*, and *moulding* and *working* it into different kinds of articles to be used in the construction of locomotive engines, are intended to be used.

A forge or furnace for the manufacture of iron, has a definition comprehended and understood alike by scientific men and mechanics acquainted with the business; and in such cases the definition will control in the construction of the covenant. *Rogers v. Danforth.* 289

D.

DEBTOR AND CREDITOR.

1. Where the funds in the hands of receivers for distribution among the creditors of a company, after paying prior incumbrances, amounted to much more than sufficient to satisfy the claims of the complainants, and it appeared by the bill that there was a fund in court, raised out of the property of the mortgagors, by a decree of this court, for the very purpose of paying, with other debts of the company, those due to the complainants, it was held to be inequitable to permit the complainants to enforce their claims against other lands; sufficient lands of the mortgagers having already been sold, under a decree of the court, to satisfy their mortgages.

Where two creditors have liens, the one on two funds of a debtor, and the other on one of them only, the creditor having the lien on the two will, in equity, not be permitted to invade the common fund until he has exhausted the other. But this principle is not applicable where mortgagees object to the payment of a prior mortgage out of a common fund, raised in part by the sale of the mortgaged premises, there being no allegation in the bill that the property sold did not bring enough to pay off the first mortgage. If it did, then the money taken out of the common fund to pay the first mortgage will in equity be taken as *that portion* of the fund realized from the sale of the mortgaged premises. *McKelway v. N. E. Man. Co.* 371

2. "If a creditor seeks the aid of this court against the real estate of his debtor, he must show a judgment at law creating a lien on such estate; and if he seeks aid in regard to the personal estate, he must show an *execution* giving him a legal preference or lien on the goods and chattels, which he has pursued to every available extent at law, before he can resort to equity for relief."

The exception to this rule recognized in *Blackwell et al. v. Rankin & Lee*, 3 *Hal. C. R.* 153, that this court will entertain a bill, by a creditor at large of a firm, to restrain an execution creditor of an individual member of the firm, from enforcing his legal remedy against the partnership property, is not sustained by the authorities. There can be no such exception to the rule. When the propriety of such



sent existing continuing nuisance, the appeal is not liable to be dismissed.

There can be no appeal from an order of the court of chancery directing process to bring in the parties to answer for an alleged contempt. It cannot be said that the party *is aggrieved* by such an order.

Where the order has been executed, the object attained, and there is nothing upon which a judgment of reversal could operate, the appeal will be dismissed. *Coryell v. Holcombe.* 650

4. A decree which does not dispose of the whole merits of the cause, but leaves important questions for further examination and the future judgment of the court, is not a *final decree* within the meaning of the act, which requires that "all appeals, except from final decrees, shall be made within forty days after filing the order or decree appealed from. (*R. S.* 921, § 80.) *Newark Plank Road Co. v. Elmer.* 754

ASSIGNMENT.

1. If a debtor makes an assignment for the benefit of his creditors, such assignment must be in conformity to the statute. He has no right to give a preference of one creditor over another, nor has he a right to annex to such assignment a condition which contravenes any provision of the statute.

The assignee cannot protect the property from the debtor's creditors, by virtue of such an assignment. If an assignment is made *for the equal benefit of the creditors*, the assignee must proceed to discharge its trusts in conformity to the provisions of the statute.

But where, at the request of some of the creditors, the books of account, notes, &c., were placed in the hands of a responsible person *to collect*, and for no other purpose, such an assignment was held to be no more than a power of attorney. It did not place the property beyond the control of the debtor; it created no right between the assignee and the creditors. There was nothing illegal in such assignment, nor could it prejudice the creditors. *Brown v. Holcombe and Reading.* 297

2. A., assigned to B., a decree and all the rights, powers, and equities, appertaining to the same, as fully as they were possessed by himself, with au-

will, or can be fairly implied from its provisions. *Schaenck v. Arrowsmith.* 314

DISCOVERY. See *Practice*, 2.

In the case of a bill for mere discovery, if it appears reasonable that the complainant should be entitled to the disclosure, and no principles of law or equity are violated in enforcing it, the court will not be as nice in the application of technical rules as when an injunction or relief is asked for.

So in a bill for discovery only, it is not necessary to aver that the discovery is absolutely necessary or indispensable to the defence. It will be sufficient to state and show that it is material evidence. *Howell v. Ashmore.* 82

Nor is it necessary to allege in the bill that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought; for he is entitled to it if it is merely cumulative evidence of material facts. *Ib.*

DOWER.

A widow is entitled to her dower in an equity of redemption. *Hinchman v. Stiles.* 454

See *Mortgage*, 2, 4.

E.

EASEMENT.

By a grant of land, easements necessary for its enjoyment are created *ex necessitate*, and pass by the grant, although not expressly named. *Brakely v. Sharp*, 1. Water was diverted by the owner of two dwellings for the use of his two dwellings, one above and the other below a road. He used the water for twenty-three years, and died. Commissioners appointed by the orphans' court to make partition of his land and assign dower, assigned the land above the road partly to his widow, and partly to one of the heirs, and afterwards by order of the court sold and conveyed the land below the road, under which conveyance the complainant held

First. That no adverse possession could begin until the severance of the title by the commissioners.

Second. That until such severance no easement could exist in the acqueduct.

Third. That by a grant of land, easements necessary for its enjoyment were created *ex necessitate*.



B.

BEQUEST. See *Will*, 8.

BONDS.

Coupon bonds payable to bearer, although not negotiable under the law merchant as bills and notes, are instruments of *a peculiar character*, and being expressly designed to be passed from hand to hand, and by common usuage actually so transferred, are capable of passing by delivery so as to confer a complete title in the possessor. They are the subject of pledge. *Morris Canal v. Fisher.* 667

C.

CONTEMPT.

See *Practice. Injunction.*

CONVERSION. See *Will.*

CONVEYANCE. See *Deed.*

CREDITOR. See *Debtor and Creditor. Fraud*, 1, 6. 7. *Judgment*, 1. *Corporation*, 4.

CORPORATION.

1. When a board of directors or a majority of stockholders, deviate from the originally contemplated undertaking, the "rights" of other and dissenting stockholders are "affected;" as against them they cannot legally do it. *Kean v. Johnson.* 401

A majority of stockholders in a prosperous corporation, cannot at their own mere caprice, sell out the whole source of their emoluments and invest their capital in other enterprises, where the minority desire the prosecution of the business in which they had engaged. The contract is, that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes. *Ibid.*

Where the duration of such employment is limited in the charter, until that time it must continue so employed, unless, perhaps, in case of clear loss. If no time is fixed by the charter, at which the pro-

ments of accounts by the orphans' court, and to prescribe the particular cases in which alone that court may open the account and order a re-settlement. *Ibid.* 572

An advancement made in the lifetime of the testator is no part of the estate to be administered by his executor. And where the will directed that the advancement should be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the sum advanced should be deducted from the share of the child advanced. It was *Held*, that the whole design and operation of the clause was to designate the mode in which the distribution should be made, in order to insure perfect equality among the legatees. It did not change the nature of the advancement. *Ibid.*

The notes of a debtor of an estate, who is non-resident and insolvent, may be omitted, both in the inventory and in the account, with perfect propriety. And no influence unfavorable to the executor should be drawn from it. *Ibid.*

3. An executor or administrator cannot, directly or indirectly, become a purchaser of his own sale. *Mulford v. Bowen.* 797

See *Trust and Trustee*, 3 and 4.

4. An executor or administrator, as a general principle, has no right to change the character of the trust fund. *Quick v. Fisher.* 802

EVIDENCE.

1. No person can be deprived of the right to manage his own affairs, or of his personal liberty, without the intervention of a jury; and in cases of lunacy, the verdict of the jury is to be founded, as in all other cases, upon satisfactory and unexceptionable evidence submitted to their consideration. *In the matter of Runey Dey.* 181

2. On taking an inquisition, unlawful evidence was admitted, on exceptions duly made; declarations not under oath, as to the state of mind of the alleged lunatic. But it appearing that a large number of witnesses had been examined, that the alleged lunatic was before the jury, that the investigation continued for five successive days, and that the defence had been conducted by able counsel. It was *held* that the court would not be justified in

interfering with the proceedings, on account of the admission of this testimony, its character not being such as must *necessarily*, or *did probably* influence the jury in their finding.

It is not a good ground for exception, that "the infant children of the petitioner were day by day brought before the jury, and appeals as from them and in their behalf, made to said jury by the counsel having the conduct of the suit or application." *Ibid.*

3. Courts of equity have manifested much more liberality in admitting parol evidence in cases of specific performance, to resist than to enforce it. Yet the principle has never been established by authority, that such evidence is admissible, even in defence, to *vary* or *contradict* a written agreement.

But there is a great difference between introducing parol evidence for the purpose of showing that the writing does not express the *true intention* of the parties, and introducing it for the purpose of showing the circumstances which make it inequitable and unconscientious, that the intention should be carried out. *Stoutenburg v. Tompkins.* 332

4. Although books of a company are not evidence against third persons, a memorandum in writing made by an agent of the parties, and at their request, is evidence for and against them, and for and against all persons claiming under them. *N. E. Man. Co. v. Van Dyke.* 498

F.

FRAUD (STATUTE OF.) See *Pleading.*

FRAUD.

1. A general creditor having no specific lien on his debtor's property, has no right to interfere with any disposition his debtor may make of it, but an attaching creditor has such a lien as will enable him to maintain a suit in chancery to set aside as fraudulent, conveyances or judgments under which the property attached is claimed.

A bill for that purpose should be for the benefit of the complainant and such others of the creditors as should come in and seek relief by and contribute

and use it for several years; no conveyance by deed is made to them—a mere memorandum of the transaction being made on the journal of the treasurer.

Held, that when the consideration for the property was received, its former owners became mere trustees of the company, and held the title for the company. Any conveyance made by them subsequent to that transaction, though for a full consideration to a grantee with notice, would be void against the company.

A judgment creditor at best stands in no better situation than such a grantee. *N. E. Man. Co. v. Van Dyke.* 498

5. The directors of an incorporated company cannot speculate with the funds or credit of the company, and appropriate to themselves the profit of such speculation. They cannot, in making sales, or purchases for the company, take advantage of their position as directors, and either directly or indirectly, speculate upon the company.

If such a transaction has involved a complainant in a law suit, there is no propriety in his appealing to a court of conscience to give him redress, which he is not entitled to by the strict rules of the common law. *Redmond v. Dickinson.* 507

6. The slight but unavoidable obstruction of public rivers by a railroad company under the authority of their charter, is a necessary evil which must be borne for the sake of the public good which demands it. *Att'y Gen'l v. Hud. R. R. R.* 526

That which would otherwise be a nuisance if done under authority of law for the public good, is justifiable. *Ibid.* 526

7. The act of 15th of February, 1844, entitled "An act to relieve the creditors of The Trenton Delaware Falls Company." by which the receivers who had been appointed by the court were authorized to sell the real estate, franchises, and works of the said company free and clear of all incumbrance, and providing that nothing in the act contained should be construed to affect the rights of the creditors, or to invalidate any existing lease made by said company, *or assignment thereof*, is a constitutional and valid act. It was designed to be in aid of the creditors of the company, not to invali-

date any contracts, but to enforce them—not to impair any securities, but to aid in obtaining the benefit of them.

The assignment of a lease is properly the transfer of the interest of the tenant. The reason and spirit of the law, no less than its language, requires *that the assignment of leases* should be construed to refer to the transfer of the rights of the tenants, and not to a mere assignment of the rent. Upon this interpretation the act is constitutional.

A company authorized to draw water from a river, and owning the race-way and the land upon which it was constructed, have the right to the use of the water flowing over their land through their race-way, as incident to the ownership of the lands, as in fact a part of the land itself; and in such case, neither is the rent of the water, nor the right to receive and demand it, a franchise. *Potts v. Trenton Water Power Co.* 592

8. Two railroad companies were incorporated to complete two independent lines across the state. No route was prescribed to either other than the termini. There was no conflict of routes on the face of the charters, and no necessary conflict in carrying out the objects of the charters.

Held, that the prior right attached to the company which first actually surveyed and adopted a route and filed their survey in the office of the secretary of state.

That as no specific route was granted to either company, a right to no particular place accrued to either until they had selected or determined upon a location. That no importance should be attached to the fact that the charter of one company was passed seven days before that of the other.

The mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

By adopting and filing a survey of their route, a company acquires a right to obtain the lands over which it passed; and they cannot be deprived of that right by another company purchasing and taking deeds for those lands, even if made without notice.

Such conveyances could at most put the purchasers in the condition of land owners, liable to have their

lands taken, upon making compensation. *Morris and Essex v. Blair.* 635

9. By the eighth section of the act incorporating the Newark Plank Road and Ferry Company, the company are authorized to construct a plank road, to commence in the city of Newark, east of Broad street, and thence, passing by the most convenient and direct course, to the bank of the Passaic river, near the old ferry, and across the meadow between the Passaic and Hackensack rivers, and through the county of Hudson, in the most eligible route, to its point of termination in said county and opposite the city of New York; and that it shall be lawful for the said company at any time to drive piles and erect or build piers, wharves, platforms, ferry stairs, or other works necessary for the said road and ferries thereon in the said Passaic and Hackensack rivers; provided always, that the free and uninterrupted navigation of vessels in said rivers, or either of them, is not thereby prevented by any bridge or other obstruction, in any manner whatever. The eleventh section provides that the company shall keep and maintain two good and sufficient ferry boats at the respective ferries on each of the said rivers, and shall cause lamps to be put up at the extreme point of each pier at said ferries, which shall be lighted before dark every evening, and kept lighted until daylight next morning. After the company had driven piles and indicated the distance to which they intended to project piers into the river, a bill was filed, praying an injunction restraining the said company from projecting piers, &c., into the Passaic river, and from obstructing the free navigation of said river. *Held*, that the act gives the company the right to extend their works *beyond the banks of the river;* that the language of the proviso assumes that the works authorized will be an *obstruction* to the river, but provides that no *such obstruction* shall be built or erected as would prevent the free and uninterrupted navigation of vessels in the river. *Newark Plank Road Co. v. Elmer.* 754

As the plan of the company, mentioned in the bill and answer, and upon which they were proceeding to construct their works in and over the river, extended into the river to the obstruction of naviga-

tion, beyond *what was necessary for the purposes of and contemplated by the act of incorporation*, an injunction was allowed, restraining the defendants from constructing their works upon that plan.

Held, that if the contemplated plan would occasion an obstruction to the navigation of the river, *beyond what the charter authorized*, the works would be a nuisance. *Ib.*

Every erection in a navigable river, which obstructs or hinders the navigation, is a nuisance. *Ib.*

It is well settled that grants of this nature are to be construed strictly, and not extended beyond what is *reasonably necessary* for the purpose the act contemplates. *Ib.*

The issue made is that the piers were proposed to be built *as the charter authorized*, and would not prevent the free and uninterrupted navigation to any greater extent than was intended by it. The question is as to the meaning of the charter. It is too plain to admit of a reasonable doubt, that independent of the charter, they would constitute a nuisance. *Ib.*

COVENANT.

1. It would seem that a tenant may ask the aid of this court to prevent his landlord from breaking a covenant which, though not made with the tenant, will work a forfeiture of his estate.

It does not follow that because a suit at law cannot be maintained on such a covenant, a court of chancery may not protect the rights of parties under it.

It is no breach of a covenant which prohibits the erection of a forge or furnace *for the manufacturing of iron*, or the erection of any building for any such purpose, to erect buildings in which forges for the purpose of *heating iron*, and *moulding* and *working* it into different kinds of articles to be used in the construction of locomotive engines, are intended to be used.

A forge or furnace for the manufacture of iron, has a definition comprehended and understood alike by scientific men and mechanics acquainted with the business; and in such cases the definition will control in the construction of the covenant. *Rogers v. Danforth.* 289

D.

DEBTOR AND CREDITOR.

1. Where the funds in the hands of receivers for distribution among the creditors of a company, after paying prior incumbrances, amounted to much more than sufficient to satisfy the claims of the complainants, and it appeared by the bill that there was a fund in court, raised out of the property of the mortgagors, by a decree of this court, for the very purpose of paying, with other debts of the company, those due to the complainants, it was held to be inequitable to permit the complainants to enforce their claims against other lands; sufficient lands of the mortgagers having already been sold, under a decree of the court, to satisfy their mortgages.

Where two creditors have liens, the one on two funds of a debtor, and the other on one of them only, the creditor having the lien on the two will, in equity, not be permitted to invade the common fund until he has exhausted the other. But this principle is not applicable where mortgagees object to the payment of a prior mortgage out of a common fund, raised in part by the sale of the mortgaged premises, there being no allegation in the bill that the property sold did not bring enough to pay off the first mortgage. If it did, then the money taken out of the common fund to pay the first mortgage will in equity be taken as *that portion* of the fund realized from the sale of the mortgaged premises. *McKelway v. N. E. Man. Co.* 371

2. "If a creditor seeks the aid of this court against the real estate of his debtor, he must show a judgment at law creating a lien on such estate; and if he seeks aid in regard to the personal estate, he must show an *execution* giving him a legal preference or lien on the goods and chattels, which he has pursued to every available extent at law, before he can resort to equity for relief."

The exception to this rule recognized in *Blackwell et al. v. Rankin & Lee*, 3 *Hal. C. R.* 153, that this court will entertain a bill, by a creditor at large of a firm, to restrain an execution creditor of an individual member of the firm, from enforcing his legal remedy against the partnership property, is not sustained by the authorities. There can be no such exception to the rule. When the propriety of such

an exception can be shown, it will reveal the injustice of the rule itself. *Young v. Frier.* 465
See *Fraud*, 6.

DECREE (ASSIGNMENT OF.) See *Assignment. Practice*, 14. *Appeal*, 4.

DEED.

The acknowledgment of the receipt of the consideration money in a deed is *prima facie* evidence that the consideration is paid. But it is not conclusive. The grantor may show that the consideration was other than a moneyed consideration, or if a moneyed consideration, that in whole or in part it was unpaid.

The acknowledgment of payment in a deed is a receipt for the consideration money, and if the grantor impeaches that receipt it must be clearly made out to the satisfaction of the tribunal to which an appeal is made for redress. *Herbert v. Scofield.* 492

A deed fraudulent as to judgment creditors, may be impeached by a purchaser holding a conveyance under that judgment; but such purchaser stands in no better situation than the judgment creditor filing a bill to avoid the alleged fraudulent deed. To ascertain, therefore, the rights of the complainant, and whether he is entitled to the relief sought by his bill, we must examine into and ascertain the rights of the judgment creditors under whom he claims. *Smith v. Espy.* 160

Where a conveyance of land has been made in fee, and a third person claiming a life estate in the same land, by virtue of an alleged parol agreement made with the grantor before the execution of the deed, seeks to reform the deed so as to protect his life estate, he must make the grantor, as well as the grantee, a party to the suit.

Such agreement cannot affect the grantee unless he had notice of it. *Degroot v. Wright.* 55
See *Trust and Trustees*, 3.

DEMURRER. See *Practice, Pleading*, 14, 17.

DEVISE. See *Will*, 4, 7.

Where real estate is devised to the same person who is directed to pay a legacy, the legacy will be an equitable charge upon the real estate so devised, unless a contrary intention is expressed in the

will, or can be fairly implied from its provisions. *Schaenck v. Arrowsmith.* 314

DISCOVERY. See *Practice*, 2.

In the case of a bill for mere discovery, if it appears reasonable that the complainant should be entitled to the disclosure, and no principles of law or equity are violated in enforcing it, the court will not be as nice in the application of technical rules as when an injunction or relief is asked for.

So in a bill for discovery only, it is not necessary to aver that the discovery is absolutely necessary or indispensable to the defence. It will be sufficient to state and show that it is material evidence. *Howell v. Ashmore.* 82

Nor is it necessary to allege in the bill that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought; for he is entitled to it if it is merely cumulative evidence of material facts. *Ib.*

DOWER.

A widow is entitled to her dower in an equity of redemption. *Hinchman v. Stiles.* 454

See *Mortgage*, 2, 4.

E.

EASEMENT.

By a grant of land, easements necessary for its enjoyment are created *ex necessitate*, and pass by the grant, although not expressly named. *Brakely v. Sharp*, 1. Water was diverted by the owner of two dwellings for the use of his two dwellings, one above and the other below a road. He used the water for twenty-three years, and died. Commissioners appointed by the orphans' court to make partition of his land and assign dower, assigned the land above the road partly to his widow, and partly to one of the heirs, and afterwards by order of the court sold and conveyed the land below the road, under which conveyance the complainant held

First. That no adverse possession could begin until the severance of the title by the commissioners.

Second. That until such severance no easement could exist in the acqueduct.

Third. That by a grant of land, easements necessary for its enjoyment were created *ex necessitate.*

Fourth. That by the setting off of the land above the road before the sale of that below, there was a severance of the unity of title, and those to whom it was set off took it free from any encumbrance of the easement. *Brakely v. Sharp.* 9

EXECUTOR AND ADMINISTRATOR.

1. A testator devised to his wife the use of his personal and real estate, as long as she remained his widow, or during her natural life. At her death, or if she married, then at her marriage, all the real estate, and the residue of the personal estate was to be divided equally among the testator's children. The wife married again, and since that time to the filing of the bill, with her husband, remained in the actual possession of the larger portion of the real estate, and they received the rents from the person occupying the residue. *Crane v. Van Duyne.* 259

Held, that they must account for the rents and profits of all the real estate, of which the testator died seized, since the date of the marriage. *Ibid.*

That they could not claim an allowance for improvements put upon the estate, and for moneys paid for the tillage, care and culture of the land by the widow, during her widowhood. *Ibid.*

If a *feme sole* being an executrix or administratrix, wastes the goods of her testator or intestate, and then marries, her husband is liable as long as the coverture lasts for the *devastavit.* *Ibid.*

So where the administratrix, for a valuable consideration, and *bona fide* transferred obligations belonging to the estate of the testator to one with whom she subsequently intermarried, he has no right to retain them as his own, but must be held accountable with her for all the property which came to her possession. *Ibid.* 259

2. A palpable mistake appearing upon the face of an executor's account, after final settlement and allowance, may be relieved against in equity. *Black v. Whitall.* 572

The twenty-seventh section of the act respecting the orphans' court, R. S., 214, was not designed to limit the powers or abridge the jurisdiction of the court of chancery. The design of the section is clearly to declare the conclusiveness of the settle-

ments of accounts by the orphans' court, and to prescribe the particular cases in which alone that court may open the account and order a re-settlement. *Ibid.* 572

An advancement made in the lifetime of the testator is no part of the estate to be administered by his executor. And where the will directed that the advancement should be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the sum advanced should be deducted from the share of the child advanced. It was *Held*, that the whole design and operation of the clause was to designate the mode in which the distribution should be made, in order to insure perfect equality among the legatees. It did not change the nature of the advancement. *Ibid.*

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2. On taking an inquisition, unlawful evidence was admitted, on exceptions duly made; declarations not under oath, as to the state of mind of the alleged lunatic. But it appearing that a large number of witnesses had been examined, that the alleged lunatic was before the jury, that the investigation continued for five successive days, and that the defence had been conducted by able counsel. It was *held* that the court would not be justified in



prevent its affecting such rights, viz: the consent of every stockholder. *Ibid.*

Quere—Whether a supplement authorizing any deviation from the original charter and not requiring the consent of all the stockholders, is unconstitutional? *Ibid.*

Where the company whose road was purchased under the above supplement, and who were not a *necessary* party to any of the different *kinds of relief prayed*, had not been made a party to a bill filed by one who was a protesting stockholder, against the directors of both roads, and the company in possession of the road, and all its property but the franchise; and the objection was not taken until the hearing of a general demurrer to the equity of the bill. The court disposed of the case on its merits, without requiring such formal parties to be joined. *Ibid.*

2. Where the charter of a company required five managers to constitute a quorum, and there were but four present when a resolution was passed, authorizing the execution of a mortgage, the mortgage, is null and void, from the fact that it never received the sanction of the board of directors. *Holcombe v. The N. H. Del. Bd.*, 457.

See *Fraud by Incorporated Co's.*

3. One who had waived his right to have commissioners called, and permitted a corporation to take possession of his land without first making compensation, or pursuing the mode prescribed by the act to ascertain it; and permitted them to change the character of the property, expend large sums of money upon it, and constitute it a part of an extensive and valuable public improvement, cannot recover the possession of the land, upon paying for the improvements. The only relief the court will afford, is to give him compensation for his land, and remuneration for all damages; and this may be ascertained either by reference to a master, or the intervention of a jury. *Trenton Water Power Co. v. Chamber.* 471

4. Subscribers to the stock of a manufacturing company put in at a valuation as assets of the company, a cotton mill, &c., receive the stock of the company therefor, and dispose of the same as their own. The company take possession of the mill

and use it for several years; no conveyance by deed is made to them—a mere memorandum of the transaction being made on the journal of the treasurer.

Held, that when the consideration for the property was received, its former owners became mere trustees of the company, and held the title for the company. Any conveyance made by them subsequent to that transaction, though for a full consideration to a grantee with notice, would be void against the company.

A judgment creditor at best stands in no better situation than such a grantee. *N. E. Man. Co. v. Van Dyke.* 498

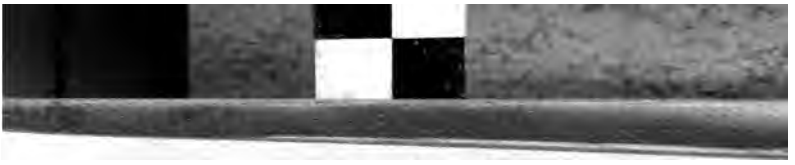
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Held, that the prior right attached to the company which first actually surveyed and adopted a route and filed their survey in the office of the secretary of state.

That as no specific route was granted to either company, a right to no particular place accrued to either until they had selected or determined upon a location. That no importance should be attached to the fact that the charter of one company was passed seven days before that of the other.

The mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

By adopting and filing a survey of their route, a company acquires a right to obtain the lands over which it passed; and they cannot be deprived of that right by another company purchasing and taking deeds for those lands, even if made without notice.

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9. By the eighth section of the act incorporating the Newark Plank Road and Ferry Company, the company are authorized to construct a plank road, to commence in the city of Newark, east of Broad street, and thence, passing by the most convenient and direct course, to the bank of the Passaic river, near the old ferry, and across the meadow between the Passaic and Hackensack rivers, and through the county of Hudson, in the most eligible route, to its point of termination in said county and opposite the city of New York; and that it shall be lawful for the said company at any time to drive piles and erect or build piers, wharves, platforms, ferry stairs, or other works necessary for the said road and ferries thereon in the said Passaic and Hackensack rivers; provided always, that the free and uninterrupted navigation of vessels in said rivers, or either of them, is not thereby prevented by any bridge or other obstruction, in any manner whatever. The eleventh section provides that the company shall keep and maintain two good and sufficient ferry boats at the respective ferries on each of the said rivers, and shall cause lamps to be put up at the extreme point of each pier at said ferries, which shall be lighted before dark every evening, and kept lighted until daylight next morning. After the company had driven piles and indicated the distance to which they intended to project piers into the river, a bill was filed, praying an injunction restraining the said company from projecting piers, &c., into the Passaic river, and from obstructing the free navigation of said river. *Held*, that the act gives the company the right to extend their works *beyond the banks of the river;* that the language of the proviso assumes that the works authorized will be an *obstruction* to the river, but provides that no *such obstruction* shall be built or erected as would prevent the free and uninterrupted navigation of vessels in the river. *Newark Plank Road Co. v. Elmer.* 754

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tion, beyond *what was necessary for the purposes of and contemplated by the act of incorporation*, an injunction was allowed, restraining the defendants from constructing their works upon that plan.

Held, that if the contemplated plan would occasion an obstruction to the navigation of the river, *beyond what the charter authorized*, the works would be a nuisance. *Ib.*

Every erection in a navigable river, which obstructs or hinders the navigation, is a nuisance. *Ib.*

It is well settled that grants of this nature are to be construed strictly, and not extended beyond what is *reasonably necessary* for the purpose the act contemplates. *Ib.*

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1. It would seem that a tenant may ask the aid of this court to prevent his landlord from breaking a covenant which, though not made with the tenant, will work a forfeiture of his estate.

It does not follow that because a suit at law cannot be maintained on such a covenant, a court of chancery may not protect the rights of parties under it.

It is no breach of a covenant which prohibits the erection of a forge or furnace *for the manufacturing of iron*, or the erection of any building for any such purpose, to erect buildings in which forges for the purpose of *heating iron*, and *moulding* and *working* it into different kinds of articles to be used in the construction of locomotive engines, are intended to be used.

A forge or furnace for the manufacture of iron, has a definition comprehended and understood alike by scientific men and mechanics acquainted with the business; and in such cases the definition will control in the construction of the covenant. *Rogers v. Danforth.* 289

D.

DEBTOR AND CREDITOR.

1. Where the funds in the hands of receivers for distribution among the creditors of a company, after paying prior incumbrances, amounted to much more than sufficient to satisfy the claims of the complainants, and it appeared by the bill that there was a fund in court, raised out of the property of the mortgagors, by a decree of this court, for the very purpose of paying, with other debts of the company, those due to the complainants, it was held to be inequitable to permit the complainants to enforce their claims against other lands; sufficient lands of the mortgagers having already been sold, under a decree of the court, to satisfy their mortgages.

Where two creditors have liens, the one on two funds of a debtor, and the other on one of them only, the creditor having the lien on the two will, in equity, not be permitted to invade the common fund until he has exhausted the other. But this principle is not applicable where mortgagees object to the payment of a prior mortgage out of a common fund, raised in part by the sale of the mortgaged premises, there being no allegation in the bill that the property sold did not bring enough to pay off the first mortgage. If it did, then the money taken out of the common fund to pay the first mortgage will in equity be taken as *that portion* of the fund realized from the sale of the mortgaged premises. *McKelway v. N. E. Man. Co.* 371

2. "If a creditor seeks the aid of this court against the real estate of his debtor, he must show a judgment at law creating a lien on such estate; and if he seeks aid in regard to the personal estate, he must show an *execution* giving him a legal preference or lien on the goods and chattels, which he has pursued to every available extent at law, before he can resort to equity for relief."

The exception to this rule recognized in *Blackwell et al. v. Rankin & Lee*, 3 *Hal. C. R.* 153, that this court will entertain a bill, by a creditor at large of a firm, to restrain an execution creditor of an individual member of the firm, from enforcing his legal remedy against the partnership property, is not sustained by the authorities. There can be no such exception to the rule. When the propriety of such



an exception can be shown, it will reveal the injustice of the rule itself. *Young v. Frier.* 465
See *Fraud*, 6.

DECREE (ASSIGNMENT OF.) See *Assignment. Practice*, 14. *Appeal*, 4.

DEED.
The acknowledgment of the receipt of the consideration money in a deed is *prima facie* evidence that the consideration is paid. But it is not conclusive. The grantor may show that the consideration was other than a moneyed consideration, or if a moneyed consideration, that in whole or in part it was unpaid.
The acknowledgment of payment in a deed is a receipt for the consideration money, and if the grantor impeaches that receipt it must be clearly made out to the satisfaction of the tribunal to which an appeal is made for redress. *Herbert v. Scofield.* 492
A deed fraudulent as to judgment creditors, may be impeached by a purchaser holding a conveyance under that judgment; but such purchaser stands in no better situation than the judgment creditor filing a bill to avoid the alleged fraudulent deed. To ascertain, therefore, the rights of the complainant, and whether he is entitled to the relief sought by his bill, we must examine into and ascertain the rights of the judgment creditors under whom he claims. *Smith v. Espy.* 160
Where a conveyance of land has been made in fee, and a third person claiming a life estate in the same land, by virtue of an alleged parol agreement made with the grantor before the execution of the deed, seeks to reform the deed so as to protect his life estate, he must make the grantor, as well as the grantee, a party to the suit.
Such agreement cannot affect the grantee unless he had notice of it. *Degroot v. Wright.* 55
See *Trust and Trustees*, 3.

DEMURRER. See *Practice, Pleading*, 14, 17.

DEVISE. See *Will*, 4, 7.
Where real estate is devised to the same person who is directed to pay a legacy, the legacy will be an equitable charge upon the real estate so devised, unless a contrary intention is expressed in the

will, or can be fairly implied from its provisions. *Schaenck v. Arrowsmith.* 314

DISCOVERY. See *Practice*, 2.

In the case of a bill for mere discovery, if it appears reasonable that the complainant should be entitled to the disclosure, and no principles of law or equity are violated in enforcing it, the court will not be as nice in the application of technical rules as when an injunction or relief is asked for.

So in a bill for discovery only, it is not necessary to aver that the discovery is absolutely necessary or indispensable to the defence. It will be sufficient to state and show that it is material evidence. *Howell v. Ashmore.* 82

Nor is it necessary to allege in the bill that the plaintiff has no other witness or evidence to establish at law the facts of which the discovery is sought; for he is entitled to it if it is merely cumulative evidence of material facts. *Ib.*

DOWER.

A widow is entitled to her dower in an equity of redemption. *Hinchman v. Stiles.* 454

See *Mortgage*, 2, 4.

E.

EASEMENT.

By a grant of land, easements necessary for its enjoyment are created *ex necessitate*, and pass by the grant, although not expressly named. *Brakely v. Sharp*, 1. Water was diverted by the owner of two dwellings for the use of his two dwellings, one above and the other below a road. He used the water for twenty-three years, and died. Commissioners appointed by the orphans' court to make partition of his land and assign dower, assigned the land above the road partly to his widow, and partly to one of the heirs, and afterwards by order of the court sold and conveyed the land below the road, under which conveyance the complainant held

First. That no adverse possession could begin until the severance of the title by the commissioners.

Second. That until such severance no easement could exist in the acqueduct.

Third. That by a grant of land, easements necessary for its enjoyment were created *ex necessitate*.

Fourth. That by the setting off of the land above the road before the sale of that below, there was a severance of the unity of title, and those to whom it was set off took it free from any encumbrance of the easement. *Brakely v. Sharp.* 9

EXECUTOR AND ADMINISTRATOR.

1. A testator devised to his wife the use of his personal and real estate, as long as she remained his widow, or during her natural life. At her death, or if she married, then at her marriage, all the real estate, and the residue of the personal estate was to be divided equally among the testator's children. The wife married again, and since that time to the filing of the bill, with her husband, remained in the actual possession of the larger portion of the real estate, and they received the rents from the person occupying the residue. *Crane v. Van Duyne.* 259

Held, that they must account for the rents and profits of all the real estate, of which the testator died seized, since the date of the marriage. *Ibid.*

That they could not claim an allowance for improvements put upon the estate, and for moneys paid for the tillage, care and culture of the land by the widow, during her widowhood. *Ibid.*

If a *feme sole* being an executrix or administratrix, wastes the goods of her testator or intestate, and then marries, her husband is liable as long as the coverture lasts for the *devastavit.* *Ibid.*

So where the administratrix, for a valuable consideration, and *bona fide* transferred obligations belonging to the estate of the testator to one with whom she subsequently intermarried, he has no right to retain them as his own, but must be held accountable with her for all the property which came to her possession. *Ibid.* 259

2. A palpable mistake appearing upon the face of an executor's account, after final settlement and allowance, may be relieved against in equity. *Black v. Whitall.* 572

The twenty-seventh section of the act respecting the orphans' court, R. S., 214, was not designed to limit the powers or abridge the jurisdiction of the court of chancery. The design of the section is clearly to declare the conclusiveness of the settle-

ments of accounts by the orphans' court, and to prescribe the particular cases in which alone that court may open the account and order a re-settlement. *Ibid.* 572

An advancement made in the lifetime of the testator is no part of the estate to be administered by his executor. And where the will directed that the advancement should be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the sum advanced should be deducted from the share of the child advanced. It was *Held*, that the whole design and operation of the clause was to designate the mode in which the distribution should be made, in order to insure perfect equality among the legatees. It did not change the nature of the advancement. *Ibid.*

The notes of a debtor of an estate, who is non-resident and insolvent, may be omitted, both in the inventory and in the account, with perfect propriety. And no influence unfavorable to the executor should be drawn from it. *Ibid.*

3. An executor or administrator cannot, directly or indirectly, become a purchaser of his own sale. *Mulford v. Bowen.* 797

See *Trust and Trustee*, 3 and 4.

4. An executor or administrator, as a general principle, has no right to change the character of the trust fund. *Quick v. Fisher.* 802

EVIDENCE.

1. No person can be deprived of the right to manage his own affairs, or of his personal liberty, without the intervention of a jury; and in cases of lunacy, the verdict of the jury is to be founded, as in all other cases, upon satisfactory and unexceptionable evidence submitted to their consideration. *In the matter of Runey Dey.* 181

2. On taking an inquisition, unlawful evidence was admitted, on exceptions duly made; declarations not under oath, as to the state of mind of the alleged lunatic. But it appearing that a large number of witnesses had been examined, that the alleged lunatic was before the jury, that the investigation continued for five successive days, and that the defence had been conducted by able counsel. It was *held* that the court would not be justified in



interfering with the proceedings, on account of the admission of this testimony, its character not being such as must *necessarily*, or *did probably* influence the jury in their finding.

It is not a good ground for exception, that "the infant children of the petitioner were day by day brought before the jury, and appeals as from them and in their behalf, made to said jury by the counsel having the conduct of the suit or application." *Ibid.*

3. Courts of equity have manifested much more liberality in admitting parol evidence in cases of specific performance, to resist than to enforce it. Yet the principle has never been established by authority, that such evidence is admissible, even in defence, to *vary* or *contradict* a written agreement.

But there is a great difference between introducing parol evidence for the purpose of showing that the writing does not express the *true intention* of the parties, and introducing it for the purpose of showing the circumstances which make it inequitable and unconscientious, that the intention should be carried out. *Stoutenburg v. Tompkins.* 332

4. Although books of a company are not evidence against third persons, a memorandum in writing made by an agent of the parties, and at their request, is evidence for and against them, and for and against all persons claiming under them. *N. E. Man. Co. v. Van Dyke.* 498

F.

FRAUD (STATUTE OF.) See *Pleading*.

FRAUD.

1. A general creditor having no specific lien on his debtor's property, has no right to interfere with any disposition his debtor may make of it, but an attaching creditor has such a lien as will enable him to maintain a suit in chancery to set aside as fraudulent, conveyances or judgments under which the property attached is claimed.

A bill for that purpose should be for the benefit of the complainant and such others of the creditors as should come in and seek relief by and contribute

to the expenses of the suit, and should allege for what amount the attachment was issued, that it was executed, and what property was attached, and should make the defendant in attachment a party. *Hunt v. Field.* 36

2. Statute of, not applied to executed agreement. *King v. King.* 44

3. A *bona fide* purchaser without notice, and for a valuable consideration, is entitled to have his title protected by this court, nor will he be compelled to discover anything which will invalidate that title. But when the defendant is charged with a fraud, and that he has procured a title fraudulently, and is fraudulently setting it up to defeat the complainant, it is the peculiar jurisdiction of the court of chancery to compel such fraud-doer to disclose the fact alleged as a fraud, and all the circumstances attending the act, in order that the court may determine whether those circumstances establish the fraud or not. *Howell v. Ashmore.* 82

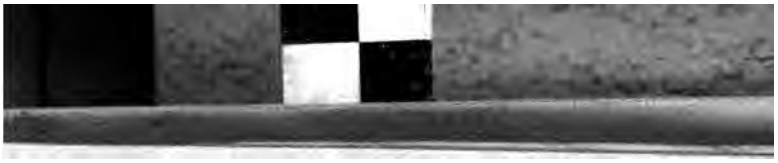
4. The powers conferred upon this court by the act to prevent frauds by incorporated companies, are *extraordinary* powers, and are to be exercised with caution, and only when the circumstances of the case and the ends of justice require it. *R. v. The Tr. M. L. In. Co.* 95

Nor is the chancellor bound as a matter of course to issue the injunction, although it is made satisfactorily to appear *that the company is insolvent;* but he must exercise his best discretion and exert the powers conferred for the safety of the public, and the advantage of the stockholders and creditors. *Ib.*

The bill, or petition, must set forth the facts and circumstances of the case. Affidavits and proofs may be read, but for no purpose except to sustain the case made by the bill, and by the opposite party in its disproof and denial. *Ib.*

It will not do to simply charge that the company is insolvent, and then take affidavits to show facts and circumstances not alluded to in the bill, to make out such insolvency. *Rawnsley v. The Tr. M. L. In. Co.* 95

5. A court will refuse to listen to any explanations of a subsequent transaction between the *parties* to a fraud, as an antidote to the poison infused into the original transaction. But where one who had been



no partaker in the iniquity of the transaction became a party to a deed with no intention of defrauding any one, and at a time when there was no person who could be injured by her accepting it, and where neither party contemplated any improper use to be made of the deed then or thereafter; and where the complainant claims under judgment creditors not standing in a position entirely aloof from the fraudulent transactions, the deed will not be set aside as fraudulent. *Smith v. Espy.* 160

One cannot question a conveyance as fraudulent against himself as a creditor, who advised and counselled its execution, who drew the deed knowing it was intended to answer a fraudulent purpose, and as a master of this court took its acknowledgment. *Smith v. Espy.* 160

6. If a debtor is about to abscond from his creditors, and with this knowledge on the part of the purchaser, and with the view of aiding him to convert his property into funds, so that he may the more readily effect his purpose, he takes a conveyance of the debtor's property, *he participates in the fraud* the debtor contemplates perpetrating, and such conveyance *is void as against creditors.*

But a debtor in failing circumstances, or about to abscond, may legally make a conveyance for the purpose of preferring *an honest creditor. Garr v. Hill.* 210

7. The principle is familiar and well established, that in order to give a creditor a standing in the court, to enable him to question the conveyance of his debtor on account of fraud, he must have some lien on the property.

The only reason why the court of chancery interferes on behalf of a judgment creditor is to remove the obstacle which has been fraudulently interposed to prevent the satisfaction of the judgment by due process of law. So where the judgment was no lien upon the land, and the complainant did not show that he had exhausted his remedy by execution, or any reason why he did not enforce his judgment against his debtor, but the bill showed that the debtor had abundant personal property to satisfy the judgment; after a delay of fourteen years, and after the debtor is dead, this court will not inter-

fere on behalf of the judgment creditor to set aside a conveyance which had been made by the debtor, for fraud. *Swayze v. Swayze.* 273

See *Jurisdiction*, 3.

8. Where every allegation of fraud, charged in a bill filed to set aside a sheriff's sale, upon several judgments and executions by one of the judgment creditors, is met and denied by the answer, and the complainant has made no effort, by proof, to sustain the fraud, the defendants are entitled to the full benefit of their answer, so far as it is responsive to the bill. *Allen v. Cole.* 286

9. A party who seeks redress on the ground of fraud, must point out and specify the fraud. A general charge of fraud is not sufficient.

That the complainant has understood that a sale was conducted fraudulently; that the defendants and others specified, were the wrong-doers; and that they suppressed certain facts which ought to have been made known, is not a sufficient statement of the facts which constitute the alleged fraud. It should appear in what respect the sale was fraudulently conducted, or what facts were suppressed to the detriment of the complainant. *Small v. Boudinot.* 381

10. Where a bill is filed to avoid a conveyance on the ground of incapacity by reason of extreme intoxication at the time of making, and charges that a deed, note, and warrant of attorney, were procured by fraud, covin, and misrepresentation, and the charges are fully, distinctly, and unequivocally denied by the answer, the rule of law requires that they should be clearly proved, and not left to presumption or conjecture. *Freeman v. Staats.* 816

FRAUD (ACT TO PREVENT BY INCORPORATED COMPANIES.) See *Appeal. Practice*, 8. *Fraud* 4.

1. The powers conferred on this court by the act are *extraordinary* powers to be exercised with caution. *Rawnsley v. Trenton Mut. L. and F. In. Co.* 95

2. Where it is manifest from the answer, that an incorporated company is largely in debt, and has no available means or credit to enable it to meet its engagements, it is the plain duty of the court, and one of the leading objects of "the act to prevent frauds by incorporated companies," to secure to the



creditors of the insolvent company, an equal distribution of its assets.

Under such circumstances, the company will be declared insolvent, and the court will apply to it such provisions of the act as it shall deem advisable for the best interest of all concerned. But it does not follow that receivers should be appointed.

The application refused, where neither the protection of the public, nor the interest of the creditors or stockholders required it. See *Oakley v. The Paterson Bank*, 1 *Gr. Ch. R.* 178. *Rawnsley v. The Trenton Mut. Life and F. Ins. Co.* 347

3. The object of the second section of the "act to prevent frauds by incorporated companies," was to prevent companies actually insolvent, or whose embarrassments were such as must inevitably lead to insolvency, from doing what it is lawful for an individual debtor to do—make a preference in favor of any creditor. It is the duty of the court to give such a construction and application to the act, as to effect the object the legislature had in view. *Holcombe v. New Hope Del. Br.* 457

So where it appeared that several days prior to the execution of a mortgage, the company had refused to redeem its bills, and that the day after its execution the company was hopelessly insolvent. And that after the first act of insolvency, a portion of the directors had been called together for the very purpose of securing the debt due to the particular creditor, in contemplation of the insolvency of the company. The mortgage was held to be utterly null and void as against creditors, and in direct violation of the letter of the act. *Ib.*

A company cannot, on the eve of insolvency, transfer its property to secure certain favorite creditors, and *they* claim the benefit of the proviso of the second section of the act. This proviso was intended to protect a stranger, who, in good faith, and in total ignorance of the situation of the company, makes a purchase of its property, and pays down the consideration money. *Ib.*

By the seventeenth section of the act, it is enacted: "That in case any such company, or person or persons whatever, shall think themselves or himself aggrieved by the proceedings or determination of the said receiver or receivers or trustees, in the

discharge of their duty, it shall be lawful for the party aggrieved to appeal to the chancellor, who shall, in a summary way, hear and determine the matter complained of, and make such order touching the same, as shall be equitable and just." The chancellor may ask the aid of a jury *under the general power of the court*. An issue may be directed if any matter of fact shall render the intervention of a jury necessary. But the effect of the verdict would be very different from that of a jury *under the thirteenth section of the act to prevent frauds by incorporated companies*. Under the last act, the verdict would be conclusive, unless set aside by an order of the supreme court. If ordered by the chancellor under the general power of the court, it would be to inform his conscience, and he would not be bound to respect it unless his judgment approved it.

But in such cases, the chancellor will not ask the intervention of a jury unless the case is made a very doubtful one by the evidence. *Holcombe v. New Hope Del. Bridge.* 457

H.

HUSBAND AND WIFE.

The laches of the husband to enforce the claim of a married woman for a legacy bequeathed to her, is not available in equity to defeat the claims of the wife, except upon the ground of presumption of payment. *Black v. Whitall.* 572

I.

INJUNCTION.

1. The court will not, as a matter of course, grant an injunction and appoint a receiver where under a judgment and execution against one partner, his interest in the partnership effects is sold. *Renten v. Chaplain and Carter.* 62
2. Motion to restrain and injoin refused, where the case made by the pleadings and the proof corresponding therewith, did not justify the court in declaring the company insolvent, and subjecting it to



the provisions of the act to prevent frauds by incorporated companies. *Rawnsley v. The Tr. M. L. Ins. and F. Co.* 95

3. Where an injunction had been allowed by a master, and the material matters in the affidavit inducing the making of the order, were contradicted by the records of this court, the chancellor, on motion, dissolved the injunction. *En. v. Mathis.* 110

Where an injunction has been obtained on a misrepresentation of facts, it does not alter the case whether that misrepresentation was through inadvertence, misinformation, or otherwise. *Endicott v. Mathis.* 110

4. While a party is in contempt for disobedience to an injunction, he cannot properly have a hearing on a motion for its dissolution. But when the nature and extent of the punishment to be inflicted for such contempt, depend on the determination of the question whether the injunction shall be continued or not, the hearing may be allowed. *Endicott v. Mathis.* 110

5. The court will not interfere to stay waste in cutting timber, where the complainant, by his own showing, has promoted suits against some of the defendants to the bill for cutting timber on the land where the court are asked to stay waste, and has never been able to succeed in obtaining the verdict of a jury or a judgment of the court, and has himself been prosecuted by some of the defendants for a trespass on the lands, and a verdict of two thousand dollars rendered against him, the complainant not alleging that any of the defendants are insolvent or unable to respond to any amount of damages he may have sustained. *West v. Page.* 119

6. In making an exception to the general rule that the court will dissolve an injunction when the equity of the bill has been fully answered, the court will be governed in some degree by the consequences to follow upon the dissolution, and by the conduct of the complainant in prosecuting his suit.

There should be some good reason for making an exception to the rule. Where the complainant has not prosecuted his suit with diligence, and no insuperable mischief can be done to the party by dissolving the injunction, the court will not deny the

defendant the benefit of his answer. *Greenn v. Hoey and Moore.* 137

7. An injunction will be dissolved where the bill shows no necessity for the court's affording the complainant such protection. The power to restrain by injunction is confided exclusively to this court, and should be exercised with caution, and only where there is a necessity for it. An individual ought not to be restrained by this court, in the exercise of any legal right, unless the ends of justice require it. *Mullen v. Jennings.* 192

The power of injunction committed to this court is a delicate and a most important power, and should always be exercised with caution to prevent—not to do mischief; to protect and sustain, not to render the enjoyment of rights and property uncertain; to put an end to, not to encourage litigation. *Cornelius v. Post.* 196

This court has the power and will interpose, *not to stay a mere trespass*, which can be redressed at law, but to prevent the *destruction of the inheritance*; and it will do this though the title is in dispute, and even where the possession is in dispute, as is frequently the case as to extensive tracts of unimproved lands. *Ib.*

The rule as to the effect of new matter in an answer on a motion to dissolve, is, that where the answer *admits the equity of the bill*, but sets up new matter for defence, on which alone the defendant relies for dissolution, the injunction will be continued to the hearing. *Ib.*

8. Where an injunction had been granted to stay a suit at law, that the defendants might make discovery, and that the complainants might have relief in the premises in this court; and the defendants, subsequently moved to dissolve the injunction, on the ground that the equity of the bill had been fully answered, and the discovery prayed for obtained; the court refused the motion, because the bill prayed for *relief* as well as discovery, and in regard to a subject matter which appropriately belonged to equity jurisdiction.

But the bill must show a case of manifest propriety in this court's retaining the cause, where a suit has been commenced at law, and the party seeks to



change the forum of litigation, and prays for relief as well as discovery. *Brown v. Edsall.* 256

9. Where the complainants ask for an injunction to protect them *from apprehended danger*, and the answer denies that such apprehensions are well founded, the court, as a general rule, will give to the defendants the full benefit of such denial, and refuse the injunction; and when both parties come before the court with affidavits, the court will refuse the injunction, unless the complainants make out a very clear case by their bill and affidavits. *Rogers v. Danforth.* 289

10. In a proper case made, a court of equity will interfere to prevent a disposition of the property of a corporation *for other than corporate purposes.* *Kean v. Johnson.* 401

11. Although the general rule is, that when the equity of the bill is answered, the defendant is entitled to the benefit of his answer, and the injunction should be dissolved, the rule is subject to exceptions. The motion is addressed to the sound discretion of the court, which should always be exercised with a proper regard to well established rules, but not in such slavish obedience to them as to defeat the ends of justice.

So in a case where if the motion prevailed the cause was virtually decided, and the complainants would be deprived of their only remedy, and the answers showed circumstances enough for a well founded belief that they did not give the true character of the transaction; although they technically denied the equity of the bill, the court would not dissolve the injunction. *Fleischman v. Young.* 620

12. The object of a preliminary injunction is to prevent some threatening, irreparable mischief which should be averted until opportunity is afforded for a full and deliberate investigation of the case.

Where it does not appear that irreparable mischief is liable to ensue from leaving a party to go on exercising a right he claims, the court never stops him before it has an opportunity of examining the question of right.

The mere *erection* of a house *intended* as a poor and work house, is, in itself, no injury to anybody; nor is the sending of paupers into a township or county

illegally, or keeping them there a few months, a case of irreparable mischief.

Where, at the time a preliminary injunction was applied for, the main question in the cause, which was essentially a question of law, was pending before a court of law, the application was refused. The rule has been long established, that in such cases a court of equity does not interfere by injunction until the question of right is determined. *Att'y General v. Paterson.* 624

See *Trust and Trustees*, 3.

J.

JUDGMENT AT LAW.

1. The fact that a judgment was allowed to stand open for twenty-four years, when the creditor had under execution, and within his reach, property ample to pay the judgment, is not conclusive that it was satisfied; the indulgence may be explained.

When called upon by a *bona fide* purchaser or mortgagee, a creditor must account for personal property he has levied upon; he must show that it did not go to pay his judgment. The presumption of law is that it did. *Johnson v. Tuttle.* 365

JURISDICTION.

1. It is not sufficient to show that *injustice has been done in a trial at law*, to entitle the party to the interference of this court; but it must have been done under circumstances which authorize the court to interfere. If a matter has already been investigated in a court of justice, according to the common and ordinary rules of investigation, a court of equity cannot take on itself to enter into it again. *Vaughn v. Johnson.* 173

This court cannot grant relief on the ground that the court at law erred in overruling evidence. An interference on such grounds would convert the court of chancery into a court of errors, and would be an assumption of jurisdiction which does not belong to the court. *Ib.*

If the defence is equally available at law as in equity, and the party has had an opportunity of making the defence at law, a court of equity has no jurisdic-

tion to relieve against the judgment, unless some special ground for relief can be established other than that of an error in law committed by the court which had jurisdiction of the case. *Ib.*

2. As a general rule, this court will not interfere with a judgment at law, solely because the principal witness was mistaken as to facts, and was subsequently found to be in error. *Ib.*

Nor will relief be granted where the party has been deprived of his defence, in any manner through his own neglect or laches. *Ib.*

The complainant stated that he had been deprived of his defence in a trial at law, by the courts allowing parol proof of a judgment. *Held*, that against such a decision of the court, the complainant can obtain no relief here. *Ib.*

3. There can be no doubt as to the power of the court to grant relief against a judgment which is against conscience, which was obtained by fraud or in any other way, by which injustice has been done; and where the injured party has had no opportunity of defence, or could not make it through any defect of the law, and where adequate relief cannot be afforded by the court where such judgment was obtained, and timely application for relief is made to this court. *Authorities collected*, 3 *Green's Ch.* 466. *Moore v. Gamble.* 246

See *Injunction*, 8.

4. The rule, as to the jurisdiction of this court to prevent by its interposition, the further litigation of a matter at law, is that "courts of equity will not interfere before a trial at law, nor until the right has been satisfactorily established at law. But if so established, it is not material what number of trials have taken place. *Pat. and Hudson River R. R. v. Jersey City.* 434

5. In the settlement of the estates of decedents, this court has concurrent jurisdiction with the orphans' court. But where jurisdiction has been assumed by the orphans' court, it is not the *right* of a party to change the form of settlement at his pleasure. *Van Mater v. Sickler.* 483

6. It is not for this court to determine whether there has been any irregularity in laying out a street. Such proceedings must stand until set aside by a

legal tribunal which has authority to interfere. *Butler v. Rogers.* 487

7. It does not belong to a court of equity to determine disputed titles to land. *Waddell v. Beach.* 793

L.

LEASE.

The assignment of a lease is properly the transfer of the interest of the tenant. *Potts v. The Tren. W. P. Co.* 592

LEGACY. See *Devise. Will*, 6, 7.

A bequest to W. J. T., "when he arrives at the age of twenty-one years, to him and his heirs forever," is a contingent legacy, and vests only on condition that the legatee live to the age of twenty-one; if he die before that age the legacy lapses. *Gifford v. Thorn.* 702

LIMITATION.

The statue will not deprive an obligor from setting up a payment made ten years before, and not credited on the bond. Nor where there is a mutual running account, can he be deprived of the benefit of a payment. *King v. King.* 44

LIMITATION (STATUTE OF.)

A court of equity acts in analogy to the law, in applying the statute of limitations. "As long as there is a continuing and subsisting trust acknowledged or acted on by the parties, the statute does not apply; but if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes *adverse*, lapse of time from that period may constitute a bar in equity." What lapse of time will constitute a bar must depend, in a measure, upon the nature of the trust, the relative situation of the parties to the subject matter of the trust, and other attending circumstances.

Where a party has slept over his rights for more than twenty years, and has been grossly negligent in not asserting them, when fitting opportunities have presented; where he has recognized or acquiesced in acts inconsistent with the existence of any trust;

and where his conduct has been such as to involve innocent parties, as against them the court will never execute the trust. *Dean v. Dean.* 425

LUNACY. See *Practice*, 6. *Evidence.*

M.

MASTER.

The court will not interfere with the report of a master upon a question of facts submitted to him, depending upon the credibility of witnesses, unless the error of the master is satisfactorily and clearly made to appear. *Sinnickson v. Bruere.* 659

MORTGAGE.

1. In a bill to foreclose a mortgage, the rights of all incumbrancers at the commencement of the suit, not made parties, are not bound or affected by the decree.

If the first mortgagee brings a bill to foreclose against the mortgagor, and obtains a decree, without making subsequent incumbrancers parties, their rights are not foreclosed. And their remedies still remain against a purchaser, claiming under the decree. (*Canby v. Ridgway*, *October term*, 1826.) *McCall v. Yard.* 358

2. The principle is well settled, that a widow is entitled to her dower in an equity of redemption.

If land is sold under a prior mortgage, in which the wife joined, and the husband is dead at the time of foreclosure and sale, the court will protect the widow's thirds to the surplus, against a mortgagee whose mortgage she did not unite with her husband in executing.

But a second mortgage cannot be postponed to a third; it does not lose its priority from the mere fact that the wife did not sign it. The husband has the right to mortgage his interest in the land, without his wife's consent, and a third mortgage can derive no superiority on that interest to the second mortgage, because he has procured a lien on the further rights of the wife. *Hinchman v. Stiles.* 361

3. Where a bill is filed to foreclose the equity of redemption, and for sale of property to satisfy what



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account, after final settlement and allow-
be relieved against in equity. *Black v.*
572

N.

NAVIGATION. See *Corporation.*

The right of navigation is a pre-existing public right, and he who claims authority to impair or obstruct this right by legislative grant, must show it by the clear and explicit terms of the grant itself, or at least by necessary implication. *Att'y Gen'l v. Hud. R. R. R. Co.* 526

Every erection in a navigable river which hinders navigation, is a nuisance. *Newark Plank Road Co. v. Elmer.* 754

If a railroad company go *beyond the authority of their charter*, in such erection, it become a nuisance; but not if erected as *the charter authorized. Newark Plank Road Co. v. Elmer.* 754

The only question is, Is it authorized by the charter? It is plain that it is a nuisance if *unnecessary* for the objects contemplated by the charter, *and not expressly authorized. Ibid.*

NUISANCE. See *Corporation.*

1. There may be circumstances where even the noise of a steam engine may become a *private* nuisance, and its use on that account be restrained by the court. But it would seem that the use of a steam engine is not *prima facie* a nuisance, on account of its danger to life from explosion. *Davidson v. Ishqn.* 186
2. The machinery of a mill, which adjoined private dwellings in a densely populated part of a city, was

ven by a steam engine. The complainants alleged that the lives of those residing in the neighborhood were exposed to the danger of the bursting of the boiler of the steam engine—that the working of the steam engine and machinery shook the adjacent houses, and particularly two of the houses owned *by one of the complainants*—that the business there carried on caused smoke, steam, vapor, and unwholesome stenches, of a nauseous and disgusting character, rendering it uncomfortable to dwell in the vicinity. The defendants denied that their business as carried on was a nuisance, and alleged that the facts upon which the complainants rely had been submitted to the proper tribunal for trying issues of fact, and that the issue had been found in their favor.

Held, that the business being a lawful one, the question of nuisance is a matter of fact to be determined by the evidence. That upon conflicting testimony, this court would not interfere, where the question of fact had been previously submitted to a court of law, whose peculiar province it is to determine questions of law involved in the issue, and to guide and direct the jury to a proper result. That it is not necessary to constitute a nuisance that the smell should be unwholesome, it is enough if it render the enjoyment of life and property uncomfortable. *Ibid.* 186

3. As a general rule, the court ought not to interfere in cases of nuisance, where the injury apprehended is of a character to justify conflicting opinions, whether the injury will in fact ever be realized. *Butler v. Rogers.* 487

4. The erection of bridges over rivers, *with proper draws*, so constructed and placed as to do the least possible injury to navigation, has never been held to be a nuisance. The slight, but unavoidable obstruction which such bridges occasion is a necessary evil which must be borne for the sake of the public good, which demands it. *At'ty General v. Hud. R. R. R.* 526

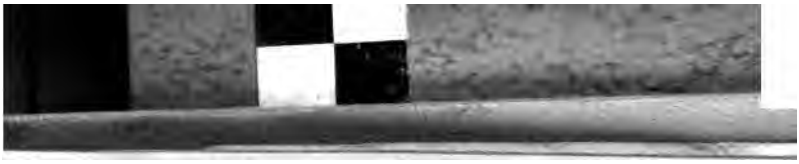
Although it is said "that courts of equity will grant an injunction to restrain a nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence, and that if the evidence be conflicting, and the injury to the public

casioned the confidence and loss, is not applicable, for *both acted with full knowledge of all the facts.*
That the complainant stands in a very different position from his grantor. If his grantor had an equitable claim to be paid for the improvements, he has no equity, unless he is a *bona fide purchaser without notice.*
That the bill should have been demurred to, for want of the allegation. *Baldwin v. Richmond.* 395
3. A palpable mistake, appearing upon the face of an executor's account, after final settlement and allowance, may be relieved against in equity. *Black v. Whitall.* 572

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Although it is said "that courts of equity will grant an injunction to restrain a nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence, and that if the evidence be conflicting, and the injury to the public

doubtful, that alone will constitute a ground for withholding this extraordinary interposition." The cases go no further than the familiar doctrine that equity will not ordinarily interfere in case of nuisance when the complainant has a perfect remedy at law. It is important in cases where obstructions to public navigation are about to be erected, and which, when erected, can only be removed at great expense and sacrifice, that the court should exercise a preventive remedy by injunction. *Ib.*

So where the defendants were about to erect a permanent railroad bridge on a line of great and increasing travel, and were required to place it in such a position as *to do the least possible injury to navigation.* And the complainants alleged that the position in which it was contemplated to place the piers and draws, *was not* the one which would do the least injury to navigation, and asked a temporary injunction until the question as to whether the piers and draw were in the right position, could be examined and settled. And it appeared that the defendants were placing the draws in an *unusual* and *unnatural* position. And the charges in the bill were supported by affidavits, conclusively showing what, in the judgments of persons best able to form an opinion, the effect of the proposed erection would be. The injunction was decreed to extend no further than to restrain the defendants from erecting their proposed piers and draws in the position proposed, until the question whether the was the proper position was determined. *Att'y Gen. v. Hud. R. R.* 526

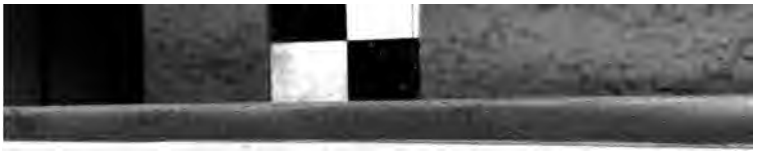
5. Every erection in a navigable river, which obstructs navigation, is a nuisance.

If a railroad company obstruct a river *unnecessarily*, and *beyond what is authorized* or *contemplated* by the charter, the obstruction is a nuisance; but it is no nuisance if built *as the charter authorized. Newark Plank Road Co. v. Elmer.* 754

P.

PARTIES. See *Deed.*

1. In a suit instituted by one of the next of kin against an administrator, for a settlement of the



estate in this court, all those entitled to a distributive share of the estate are necessary parties. *Van Mater v. Sickler.* 483

ARTNERSHIP.

A sale of partnership effects under a separate execution against one partner, operates as a dissolution of the co-partnership. *Renton v. Chaplain.* 62

If the sale be fraudulent by collusion between the purchaser and insolvent partner, the court will not aid the purchaser. *Renton v. Chaplain and Carter.* 62

See *Injunction. Debtor and Creditor*, 2.

AYMENT. See *Pleading.*

LEADING.

1. The same degree of accuracy is not required in an answer as in a bill. *King v. King.* 44

An allegation of payment in chancery pleadings is sustained by proof of satisfaction in any way, as by set-off, award, and satisfaction, &c. *King v. King.* 44

2. A mere clerical mistake of a single figure, the court would permit to be corrected instanter upon the suggestion, unless by any possibility the defendant had been misled by it. *Howell v. Ashmore.* 82

3. In a bill or petition under the act to prevent frauds by incorporated companies, it must satisfactorily appear that the company is insolvent, and the facts and circumstances of the case must be set out. *Rawnsley v. The Tr. M. Life In. Co.* 95

4. Where the whole equity of the bill rested upon the fact that the defendants were the trustees of a church, and as such were violating their trust; and there was no distinct allegation in the bill that the defendants were *such trustees*, or that there *existed* any such corporate body, nor any statement *of the manner* in which the trust they were charged with violating was committed to them.

Held, that the informalities and omissions in the bill were of such a character as could not be cured or waived by the pleadings or by consent. *Rainier v. Howell.* 121

5. An answer, purporting to be an answer of two de-

fendants, and signed by solicitor and counsel, as solicitor and counsel of the defendants, but sworn to by one only, is not what it purports to be. It is not the answer of the defendants, but of one of them only; and cannot, without the consent of the opposite party, be read as the answer even of the defendant who has sworn to it. *Vaughn v. Johnson.* 173

6. There is no objection to several complainants uniting in a bill, if the nuisance is *common to all*, but they have no right to make a joint complaint for particular injuries confined to one or two of the complainants, as shaking, &c., the houses owned by *one of the complainants.* They cannot unite their distinct and individual causes of complaint, and by their combination make a case of nuisance which separately would not establish the complaint.

But a bill may be filed by several complainants, where the matter complained of is *prima facie* a *common* nuisance, as a slaughter house in a city. *Davidson v. Ishan.* 186

7. The rule as to the effect of new matter in an answer on a motion to dissolve, is, that where the answer *admits the equity of the bill*, but sets up new matter for defence, on which alone the defendant relies for dissolution, the injunction will be continued to the hearing. *Cornelius v. Post.* 196

8. Where a bill was filed against defendants *as trustees*, and as *the representatives* of a testator, in their *representative characters*, and the prayer of the bill was in conformity thereto, the complainant is entitled to an account in that aspect only. *Scott v. Gamble.* 218

9. Where the bill prayed for relief as well as discovery, the court refused a motion to dissolve the injunction when the discovery had been obtained. *Brown v. Edsall.* 256

10. A bill which sets up distinct and different causes of complaint which destroy each other, and seeks different reliefs inconsistent with each other, is multifarious; and although no advantage be taken of the defect by the pleadings, the court may dismiss the bill, and will do it where the form of the bill embarrasses the court in the administration of justice. *Swayze v. Swayze.* 273

11. Where the defence set up by the answer is of a



character to require the complainant to make a new issue in order to meet it, he will not be permitted to do so without amending his bill, and adapting it to the case upon which he expects to sustain himself. *Van Riper v. Claxton et ux.* 302

The consideration of a mortgage was for a loan of money; and the defendant insists that the money was not advanced pursuant to the agreement, and the complainant meets that issue, but in doing so, attempts to show that if the money was not advanced in pursuance of the letter of the agreement, the advancement was sanctioned by the defendant. *Held*, that as the whole case was before the chancellor upon the proofs made by the defendant himself, it would be too technical to turn the complainant out of court. If the defendant be entitled to the benefit of the objection, the court has the power, and has frequently exercised it, of allowing a bill to be so amended as to correspond with the case, even after proof taken.

This is a case which would warrant the exercise of the power, if such a course were necessary. *Ib.*

12. That the complainant has understood that a sale was conducted fraudulently; that the defendants and others specified were the wrong-doers, and that they suppressed certain facts which ought to have been made known, is not a sufficient statement of the facts which constitute the alleged fraud. *Small v. Boudinot.* 381

13. In cases for specific performance of agreements it is now well settled, that if the defendant, by his answer, admits the parol agreement, and insists on the benefit of the statute of frauds, he will be fully entitled to it, notwithstanding such admission. But if he admits the parol agreement, without insisting on the statute, the court will decree a specific performance, upon the ground that the defendant has thereby renounced the benefit of the statute.

The same rule of pleading is applicable to cases where a bill is filed to enforce a parol trust.

If the court can execute the trust from the admissions made by the answer, so that the complainants are not under the necessity of resorting to *parol proof* of the trust, to entitle them to relief, such admissions will exclude the defendants from the benefit

of the statute, if not insisted upon by the answer. *Dean v. Dean.* 425

14. Certainty to a common intent is sufficient in bill or answer.

If a fact is stated anywhere in the stating part of the bill, with legal certainty, and is material, it is well pleaded, and therefore admitted by the demurrer.

"*Inasmuch as*" is sufficiently direct and positive; more direct than any statement under a *whereas* in a declaration, than which, a bill in equity need not be more certain. *Pat. and Hud. R. R. R. v. Jersey City.* 434

15. Where the complainant, as next of kin, calls upon the defendant, who is the personal representative of the intestate to answer in that capacity; and as an heir at law calls upon the defendant to account for the rents and profits, the bill is multifarious. *Van Mater v. Sickler.* 483

16. Where a complainant comes into court with a sworn bill, and it turns out upon investigation of the case that the bill has been framed with skill and care to avoid an impression which would be made by an ingenuous statement of the case, the complainant assumes a position in the court which deprives him of the benefit of doubts which might otherwise be resolved in his favor.

A disingenuous bill which is sworn to, is quite as obnoxious to the censure of the court as a disingenuous answer. *Herbert v. Scofield.* 492

17. Although a demurrer admits all the facts alleged in the bill, where a bill *alleged as a fact*, that a check was paid, and then proceeded to detail the *manner* and circumstances of its payment, and the circumstances appealed to, to show its payment, did not establish the fact. It was *held* that the allegation amounted to nothing. *Redmond v. Dickinson.* 507

18. Where charges of fraud are clearly made in the bill, and clearly and unequivocally denied in the answer, the answer must be taken as true, unless there is something in the circumstances of the case which shows that it is not and cannot be true.

It would not be in accordance with the practice of a court of equity, upon a mere injunction bill, to investigate and decide the legal title of two railroad companies, under their respective charters, to



a conflicting route. *Morris and Essex R. R. v. Blair.* 635

PLEDGE.

Coupon bonds being negotiable securities usually sold in the stock market, and understood by the parties to be designed for that use, they are the subject of pledge.

It is doubted whether a debtor's own obligation has ever been held to be a pledge, or whether a third party's bond or mortgage, deposited by way of collateral or as a pledge, can be sold by the pledger, unless a known usage, or express agreement to do so is shown. *Morris Canal v. Fisher.* 667

PRACTICE. See *Deed. Partnership.*

1. If a defendant fails to notice his demurrer for argument, and the complainant omits to take advantage of the failure at the first term thereafter, he may do it at a subsequent term, without first taking an order on the defendant to bring it to argument, but in that case he should serve the rule to answer on the defendant before taking a decree *pro confesso. Nesbit v. St. Pat. Ch.* 76

Where work has been done, and materials provided, under a written contract for building a church, and partial payments have been made, the precise amount of which the contractor does not know, and he claims a balance due for the work and materials, and that he has sustained damages by being improperly prevented from finishing his contract, he cannot sustain a bill in chancery praying for an account, a discovery of the payments made to him, and a decree for the balance due him for the work and his damages. *Ibid.*

The court cannot take jurisdiction of the case on the ground of account, or of discovery, or of preventing a multiplicity of suits. *Ibid.*

2. It is a proper object for a bill of discovery to ascertain, in a case where the defendant's title can only prevail, upon the ground of his being a *bona fide* purchaser, without notice of the plaintiff's title, whether he *had such notice*, and to call upon him to disclose all the circumstances which may go to probe his conscience upon that point. *Howell v. Ashmore.* 82

The act of the legislature of this state, of March 1st, 1849, permitting the plaintiff to call on the defendant as a witness upon the trial, does not deprive the plaintiff of the right to the discovery before trial by exhibiting his bill in this court. The supreme court is not competent *to grant the same relief* which this court is able to afford the plaintiff in this proceeding. *Ibid.*

It is a general rule regulating the practice of the court of chancery, that a bill of discovery filed in this court to aid in the prosecution of a suit at law, cannot be maintained against one *who might be a witness in the suit.* *Ibid.*

But the statute of 1849 has introduced a new principle unknown to the common law; a new case has arisen to which the rule could not have been applicable when adopted. It is, therefore, a question addressed to the sound discretion of the court. *Ibid.*

3. Where the chancellor had dissolved an injunction to stay the proceedings of an action of ejectment on the ground that the equity of the bill was fully answered, and subsequently a bill similar in every substantial matter was filed, in which another assumed the position of the complainant in the first bill, for the mere purpose of obviating the difficulty which the proceeding in the other suit interposed to the aid of the court being again obtained, and it was apparent that the suit was got up by the former complainant, and that he was as much interested in it as if he were a party to the record; and no reason appearing upon the face of the papers for instituting another suit.

Held that "To countenance these proceedings would encourage litigation and the multiplication of suits. It would be to exercise the injunction powers of the court—to embarrass and retard, instead of promoting justice." *Endicott v. Mathis.* 110

4. While a party is in contempt for disobedience to an injuction, he cannot properly have a hearing on a motion for its dissolution, but when the nature and extent of the punishment to be inflicted for such contempt, depend on the determination of the question whether the injunction shall be continued or not, the hearing may be allowed. *Ibid.*

The court will not allow its process to be disregarded or evaded on mere technical grounds. *Ibid.*



So when *E. M. and wife* were the lessors of the plaintiff in the action of ejectment to stay proceedings in which the order was granted, and in the writ of injunction served, the suit restrained is described as one in which *E. M. alone* is the lessor of the plaintiff, there being no other suit pending in which E. M. was the lessor of the plaintiff, and no allegation that there was any doubt as to the suit intended. It was held no sufficient reason to disregard the injunction. *Ibid.*

5. The chancellor endorsed on a bill the usual order for an injunction to issue on filing the bill, and the bill was not filed for four months after the order was made. A sheriff's sale had been delayed by the proceedings, although no injunction had actually been issued.

Held, that the proceedings were altogether irregular, and the bill must be dismissed with costs.

That the bill should have been filed, whether the injunction was made use of or not. *Stimpson v. Bacon.* 144

6. This court has the power of making a provisional order to protect the lunatic's property, pending the proceedings under the commission. But there is no precedent for converting the petition into a bill in chancery, making a case against third persons, and in this way invoking the action of the court upon matters involving the right of others not parties to the proceedings. *Matter of Runey Dey.* 181.

Such practice is condemned.

But the court will not for this reason, nor for defect or informality in the petition, set aside the proceeding if it appears from them that the supposed lunatic is so indeed, and is entitled to the protection of this court, and he will be benefitted by the court's interference. *Ibid.*

Although the affidavits accompanying the petition do not come quite up to the requirements of the rule, and practice of the court, the court will not on this account quash an inquisition by which the affidavits themselves were entirely confirmed. *Ibid.*

7. The mere filing of a replication is not a compliance with a rule to speed the cause. *West v. Page.* 203

In the absence of any established practice or rule in

our own court to the contrary, we follow the English practice, in all cases where such practice is not rendered inapplicable, by some statutory provision, or does not violate the spirit of our statutory regulations. *Ibid.*

The statutory provision which requires that every cause shall be set down for hearing at the next stated term after the filing of the replication, renders the English practice in this case inapplicable. *Ibid.*

Where on the 20th May, the defendant took an order on the complainant to speed his cause, and the order was served on the day following, and on the 22d the complainant filed his replication, and took no further step in the cause. It was *held* that the defendant was entitled to have the bill dismissed at the next stated term; because the complainant had not, in compliance with the statute, brought his cause to a hearing at that term. *Ibid.*

8. Where parties applying to receivers appointed by this court for a settlement of their accounts with a bank, admitted that the bank held their promissory note, but claimed a set-off, and insisted that the bank was largely indebted to them for interest money, commissions, &c., and the receivers decided upon the accounts of the respective parties, and refused to allow the set-off. It was held that they were "*parties aggrieved*" by the determination of the receivers, and they could not be denied the right of appeal given them by the statute.

The appellant, in his petition of appeal, should state his case fully, and the particulars in which he is aggrieved. By the answer of the receivers, the issue will be formally made between the parties. If the facts are controverted, proof can be taken in the ordinary way.

The practice of the court settled in like cases, until otherwise ordered. *Jackson v. Peoples' Bank.* 205

9. A complainant cannot be permitted to have his bill dismissed without costs, unless by the consent of the defendant in open court, or by agreement in writing. *Fisher v. Quick.* 312

See *Corporation.* 1.

10. The court will not lend a willing ear to applications to permit answers to be amended, or to be taken from its files. *Vandervere v. Reading.* 446

Where it is some mere matter of form sought to be corrected—a mistake apparent upon the face of the paper, which can be corrected without prejudice to the complainant, the objection is not so serious, and yet in such cases the court has always acted with commendable caution, never allowing it, except upon the condition that the defendant shall immediately, upon the corrections being made, re-swear the answer; and it will never make such an order where the plaintiff can be at all prejudiced by it. *Ibid.*

The court have, under some circumstances, allowed an answer to be amended in other respects than mere form. But no case can be found where a defendant has been permitted to take an answer absolutely off the file of the court, and to substitute another in its stead. *Ibid.*

With regard to reforming answers, the practice now is, not to permit an amendment of the answer filed, but to allow the defendant, upon a special application, setting out particularly the amendment, to file a supplemental answer. The court has never gone further than to permit a defendant to correct or add some single fact which had been misstated or omitted, through mistake, fraud or accident. *Ibid.*

11. Either party may set a cause down for hearing, but it is the duty of the appellant, in all cases, to prepare the state of the case. In case of neglect, the remedy is by dismissing the appeal.

It is the *right* of the appellant to prepare the state of the case, or at his option, to abandon the further prosecution of the appeal. Nor can he be deprived of that right.

Quere—Whether the respondent, in case he, as well as the appellant, is aggrieved by the decree of the court below, and insists upon a hearing as essential to his rights, may bring the cause to a hearing against the will of the appellant.

The appellant cannot be subjected, against his will, to additional costs, by the adverse party preparing the case for him. It is clearly his right to insist upon his right of preparing the case, or of abandoning the appeal at his pleasure. But where no state of the case has been prepared by the appellant, as required by the rule, the respondent may at once move to dismiss the appeal. And if the

appellant refuse to go to hearing upon a case fairly prepared by his adversary, justice would require that the appeal should be dismissed.

While the court condemn the practice of marking a case by italics, whether a state of the case shall be rejected upon this ground, rests in the sound discretion of the court.

On appeal from chancery it is not necessary to print the pleadings and evidence in full. The formal parts of the bill may always be advantageously omitted, and the pleadings in most cases materially abridged. *Cooper v. Cooper.* 655

12. The court will not interfere with the report of a master, upon a question of fact submitted to him, depending upon the credibility of witnesses, unless the error of the master is satisfactorily and clearly made to appear. *Sinnickson v. Bruere.* 659

13. A court of equity will not look back of the decree of another court to inquire into the merits of the case, if there was no fraud in the procurement of the decree.

It is not material to the conclusiveness of a decree, whether it was obtained by consent, or by a decision of the court, upon the legal principles involved in the controversy.

A judgment by default or by confession is, in its nature, as conclusive upon the rights of the parties as a judgment upon demurrer or verdict.

Where a party seeks to avoid a decree rendered in a cause in which an appearance was entered for him by a solicitor; on the ground that the court had no jurisdiction over his person, he must show affirmatively that the solicitor had no authority to enter his appearance.

There must be reasonable diligence to call into exercise the powers of a court of equity.

Persons suing *in autre droit* are not liable for costs. *Gifford v. Thorn.* 702

14. A decree which does not dispose of the whole merits of the cause, but leaves important questions for further examination, and the future judgment of the court is not *a final decree* within the meaning of the act which requires that all appeals except from final decrees, shall be made within forty days after filing the order or decree appealed from. *Newark Plank Road Co. v. Elmer.* 754

15. It does not belong to a court of equity to determine disputed titles to land.

In the absence of fraud or of some circumstance equivalent to fraud, there must be a trial and eviction at law, before a grantee, who has gone into possession under covenants of title and warranty, can have relief in a court of equity against his grantor, for a return of the purchase money, or of the security for it, on account of a deficiency or failure of title. *Waddel v. Beach.* 793

A case cannot be taken out of this principle by the fact that the party is not in the position of an original complainant seeking the aid of the court, but is a defendant, making use of a cross-bill by way of defence; the cross-bill sets up a distinct ground of relief, upon which the complainant must make out a case or fail. *Ibid.*

16. The circumstance that questions of fact involved in the cause have been passed upon by a jury, constitute no insuperable objection to the interference of this court. The office of a jury in a court of equity is not definately and finally, as in a court of law, to settle questions of fact, but simply to inform the conscience of the chancellor where he has doubt.

The fact that an issue has been awarded, and a verdict of a jury rendered in the cause upon which the decree of the chancellor is based, does not take away or limit the control of this court over the decree. *Freeman v. Staats.* 816

PUBLIC COMPANY. See *Corporation.*

R.

RAILROAD. See *Corporation.*

RECEIPT. See *Will*, 7.

RECEIVERS. See *Practice*, 8.

It does not follow that because a company is declared insolvent, receivers will be appointed. *Rawnsley v. The Tren. Mut.* 347

RELEASE. See *Will*, 4.

RELIEF.

Where an injunction had been granted to stay a suit at law, that the defendant might make a discovery, the motion to dissolve was refused because the bill prayed for *relief* as well as discovery. *Brown v. Edsall.* 256

S.

SALE. See *Trust* and *Trustee*, 2.

1. Upon a sale of property, gross inadequacy of price, joined with inequality in the position of the contracting parties, is a ground of equitable relief.

But where a sale or transfer is made from other than pecuniary considerations, or where it is uninfluced by considerations arising out of the value of the estate, this principle of equity can have no application. *Gifford v. Thorn.* 702

Where a vendor acquiesces for a long time in a transfer of property, without questioning its validity, or impeaching its good faith, it will not be set aside as fraudulent at the instance of the representatives of the vendor. *Ibid.*

2. If the advertisement of the sheriff sufficiently identifies the property to be sold, it is in compliance with the law. He need not describe the number of buildings, or their character.

The adjournment of the sale need not be advertised in a newspaper. Public proclamation made at the time at which the sale was published to take place, is all that the law requires.

One who waits to see the result of a sale, allows property to be sold on his own judgment, as well as that of other judgment creditors; and when it turns out that purchasers have not been so unfortunate as to make a bad speculation, but rather have been lucky at the expense of the judgment creditors, then complains of the unfavorable circumstances under which the sale was made, and of frauds which demanded his prompt action to entitle him to be relieved of their consequences, is not entitled to the favorable consideration of the court. *Allen v. Cole.* 286

3. S. being the owner of a valuable tract of land, entered into an agreement with a number of individ-

uals to sell them the land. By the agreement, the purchase was made up into shares of one thousand dollars each. B. was the owner of one share, and S. of five. The terms were that a certain per cent. was to be paid down, the property was then to be sold under the management and control of the majority of the shareholders, and S. was to be paid the balance of his purchase money out of the proceeds of the sale. It was sold in building lots, and B. became the purchaser of a lot of five thousand dollars; he paid one thousand five hundred dollars of the purchase money, and for the balance gave a bond and mortgage. On a bill filed by B. alleging that the sale was fraudulent, because there were under-bidders for the said property, in opposition to the complainant B., and in behalf of S., to inflate the price of the property. It was held that as the complainant was one of the owners of the property making the sale, as well as the defendant, that there could have been no under-bidding without the authority of the complainant himself. That the complainant should at least have alleged and proved that it was a secret contrivance, without his knowledge or consent. *Small v. Boudinot.* 381

4. Directors of incorporated companies, in making sales or purchases for the company, cannot speculate upon the company. *Redmond v. Dickinson.* 507.

SPECIFIC PERFORMANCE.

1. A court will not decree specific performance where it would be inequitable under all the circumstances of the case. Where a contract is hard and destitute of all equity, the court will leave parties to their remedy at law. *Stoutenburg v. Tomkins.* 332

A defendant cannot resist a specific performance on the ground that the agreement entered into differs from that which was reduced to writing, without showing that the difference was the result of fraud, mistake, accident, or surprise. *Ib.*

It is well settled, that specific performance is discretionary with courts of equity, and a defendant will generally succeed in procuring a dismissal of the bill, if he convinces the court that the exercise of the jurisdiction will be inequitable under the circumstances. *Ib.*

One who has been in the enjoyment of property under

an agreement, and has surrendered and abandoned it; who has betrayed the confidence existing between the parties, and has by his conduct and dealings with the defendant, and his treatment of the property, beguiled the defendant into the belief that he intended to give up all his rights and interest in the contract, comes into court with a case wholly void of equity, when he demands a specific performance. *Ib.*

A want of mutuality is an objection to a decree for a specific performance. *Ib.*

The court will not enforce a contract where the parties are not mutually bound to fulfil it. (*Authorities reviewed.*) *Ib.*

So where the interest of a party in a contract passed into the hands of his assignee in bankruptcy, all reciprocity as to the remedy was destroyed; and if the assignee, or a person holding under him, seeks a specific performance, he must affirm the contract and make it mutual, at least within a reasonable time. *Stoutenburg v. Tompkins.* 332

See *Pleading*, 13.

T.

TITLE (A SEVERANCE OF THE UNITY OF.) See *Easement.*

It is well settled that a court will not compel a party to pay his money and take a doubtful title, or an encumbered property, unless the party has bargained for such; although a complainant acted in good faith, and supposed he could give good title to real estate he had agreed to convey, the defendant will not be compelled to a specific performance where he must take his title subject to any encumbrance not agreed upon. *Chambers v. Tulane.* 146

TRUST AND TRUSTEE.

1. The court of chancery will go a great way in protecting trust property, even to examining into the creeds and doctrines of religious societies, if the nature of the trust depend upon them.

But it must appear in the bill that the trustees are perverting the property entrusted to them to uses and purposes inconsistent with that trust, and that



the matters complained of were not such as had been committed to their discretion; and for this purpose the court must be able to ascertain the limits of their authority over the property under their charge. *Rainier v. Howell.* 121

2. The doctrine as laid down by Sir Edward Sugden, in reference to the incapacity of a person, in the exercise of his duty as trustee, becoming the purchaser of the property of his *cestui que trust*, has always been recognized as the law in New Jersey. *Scott v. Gamble.* 218

An executor selling land, in the execution of a trust expressed in a will, either at public or private sale, or under an order of the court, cannot either directly or through the agency of another, become the purchaser, or interested in the purchase of such sale. *Ib.*

The rule, as recognized by Chancellor Kent, in *Davoue v. Fanning and others*, 2 *Johns. Ch. R.* 252, adopted in the broadest extent. *Ib.*

Where one intermarried with a widow who was the executrix of her late husband, and who had proved and taken upon herself the execution of the will, *held*, that by his marriage he assumed all the responsibilities which devolved upon his wife as executrix, and the rule as stated above would be applicable to him. *Ib.*

But where it appears that the complainant received the purchase money with a full knowledge of the facts, and deliberately ratified the sale, *with a knowledge of the fact, which would avoid the sale*, it is a bar to any relief which this court might otherwise have afforded. *Ib.*

2. The rule that an executor, administrator, guardian or trustee cannot directly or indirectly become the purchaser at his own sale, is firmly established. *Mulford v. Bowen.* 797

It is uniformly held in courts of equity, that the trustee will not be permitted to derive benefit from a purchase thus made, but that the deed will be avoided at the instance of the *cestui que trust.* *Ib.*

It has been held in this state, not only that the deed may be avoided in equity, but that as against the *cestui que trust* it will be treated as *void* in a court of law. The rule at law, however, is not that the deed is *absolutely void;* the extent of the doctrine

is that the *cestui que trust* may avail himself of the objection at law. *Ib.*

Admitting the doctrine of the courts of law in its fullest extent, the trustee, in case the deed be avoided, may be entitled to equitable relief. And the equities subsisting between the trustee and *cestui que trust* cannot depend upon the tribunal in which relief is sought. The equities of the trustee cannot be defeated by the *cestui que trust* resorting to law, rather than equity, for relief. *Ib.*

Where the cause was retained for the purpose of new relief in equity, and nothing could be gained by permitting the party to proceed with his action at law, the injunction was continued. *Mulford v. Bowen.* 797

4. As a general principle, a trustee has no power to change the character of the trust fund; and if he assume the power of converting real estate into personal, or personal into real, he acts at his peril. *Quick v. Fisher,* 802

If a change in the character of the fund be deemed necessary, or for the interest of the beneficiary, it should be made only with the permission and by the sanction of a court of equity. *Ib.*

The rule applies not only to executors, administrators, guardians of infants and lunatics, and other trustees specially constituted by law, but to all trustees having charge of the property of others. *Ib.*

And if a loss has been sustained from the trustee exceeding his authority by an unauthorized and illegal disposition of the trust funds in his hands, he is liable for the loss. *Quick v. Fisher.* 802

U.

USURY.

The defence of *usury* in a mortgage may be set up by any one claiming under the mortgagor, and in privity with him. *Brolasky v. Miller.* 807

Where the equity of redemption had been sold by the sheriff, and no decree of foreclosure was necessary against the mortgagor, he was held to be a competent witness to prove the usury. *Ib.*

W.

WASTE. See *Injunction,* 5. *Account.*



WILL.

1. Where the intention of the testator violates no principle of law or morality, it is the only guide in giving effect to a will notwithstanding it may be unreasonable. *Brearley v. Brearley.* 21

Where a testator gave to his wife absolutely a provision in real and personal estate, and also an annuity of four hundred dollars during life, to be paid by his executors, and then empowered the executors to sell the residue of his real estate, and to rent it till sold, directing them to invest the proceeds of the sales of real and personal estate, and all moneys received by them from any other source, until needed for carrying into effect the provisions of the will, and then gave to each of his two children five hundred dollars, to be paid out of the first moneys in hands of the executors, after paying debts, funeral expenses, and providing for the bequest to his wife, and then directed the residue of personal estate remaining in the hands of the executors at his wife's decease, and all the real estate then remaining unsold, to be divided equally between his two children, and the personal estate being more than sufficient to pay the debts, expenses, legacies, and provide for the annuity. *Held*,

First, that the children were not entitled to the surplus of the personal estates till after the death of the wife.

Second, that the executors had a mere naked power to sell so much of the real estate as might be necessary to answer the specific purposes of the will, but no interest in the land itself, and that the title thereto, at the testator's death, vested in his two children as heirs at law.

Third, that there being sufficient personal estate to pay debts, expenses, legacies, and provide for the annuity, the executors had no further power over the real estate, and must account for the rents received, and the proceeds of land sold, before filing the bill.

Fourth, that the rents and proceeds of sales of the real estate, did not, by the doctrine of conversion, become personal estate in the hands of the executors.

Fifth, that where the intention of the testator violates no principle of law or morality, it is the only

guide in giving effect to a will, notwithstanding it may be unreasonable, and where the intention is clear, the situation of the testator, or of his family, or property, will not be taken into consideration, but where taking the whole will together, the intention is not clear, such a construction will be adopted as will relieve against a hardship, and lead to a just and proper result. *Ibid.*

2. The intention of the testator is the law of wills, and when that intention can be ascertained, if not in violation of the rules of law, it will prevail over technical rules, and words in their technical or even ordinary meaning. The word "children" has a technical meaning in legal instruments. It is a word of *purchase*, and yet if it appears to have been the intention to use it in a different sense, as a word of *limitation*, it will be so construed, in order to effectuate that intention. *Stokes v. Tilly.* 130

A residuary clause in a will was in the following words: "I bequeath all the rest, residue and remainder of my estate, real and personal estate wheresoever, after the above legacies and money are taken out, then the remainder to be equally (divided) between the child or children of my nephew Acquila S. Ridgway and my sister Rebecca Tilly, each one to have an equal share thereof, and his children, or if but one child he should leave, to have its or their share with my sister, with the interest arising on each one's share paid them when and as they arrive at lawful age, whether then their father is deceased or living, *and for all my nieces and nephew Wallace Lippincott, the children of my deceased nephew Stacy Lippincott, to take their equal share therein with my sister Rebecca and the children of Acquila S. Ridgway.*"

Held, that the children of Stacy Lippincott, deceased, take *per capita*. *Ibid.*

3. A testator devised as follows: "It is my will and desire that all and every part and parcel of my real and personal estate *hereinbefore not devised or bequeathed*, after my son H. arrives at the age of twenty-one years, in case his mother hath then departed this life, shall be sold *at the discretion of my executors.*"

Held, that land which *had been* devised by the will, but which by the terms of the will had returned and become part of the testator's estate, was not embraced in the power of sale.

That the *power to sell* is given to the executors by *implication*. It is a personal confidence confined to them. It is not transmitted to the executor of an executor. *Chambers v. Tulane*. 146

4. A testator by his will appointed his cousin and the defendant his son, the guardians of the complainant, with directions to educate and maintain him out of the estate given to the complainant by the will. On the complainant's arriving at the age of twenty-one years, the defendant and his sister were to pay to the complainant, out of their own estate, the sum of one hundred dollars each. The complainant claimed that sum, with interest, from the time he arrived at the requisite age. The defendant alleged that since that time the complainant, for a valuable consideration, had executed a release under seal, by which he released and discharged the defendant of, and from, all actions, suits, demands, and claims whatsoever, which the said complainant then had, ever had, or could have against the defendant *as his guardian*.

Held, that the release did not cover the claims. *Cooper v. Cooper*. 566

5. A clause in a testator's will was in the following words: "Lastly. I nominate and appoint my said wife, Lucretia Scott, executrix of this my last will and testament, and in whose care and protection I leave my said children, and I hereby desire and enjoin upon her to educate and support them during their minorities, respectively, in a decent and suitable manner, for which purpose it is my intention to provide her the means, as well as for the support of herself."

Held, that there was no doubt that while the executrix enjoyed the property, she was bound to maintain the children, during their minority, to the extent of the means thus placed in her hands. But the obligation existed only while the children remained subject to her authority and under her control, as their mother. That a daughter, by marrying, withdrew herself voluntarily from her mother's family, and accepted the protection and

support of her husband, in preference to that offered by the will of the testator. It was an abandonment of the support she might otherwise have claimed. *Moore v. Gamble et ux.* 246

6. The testator gave the use of all his property, except a small legacy to his widow, and the amount was amply sufficient for her own comfortable support, and the maintainance of the children. It was *held*, that the intention of the testator was, that with the use of the property devised to his widow, she should take care of the children; and that she could not claim an allowance for the care, support and maintainance of the children, during their minority, and from the testator's death to the time of her marriage. *Crane v. Van Duyn.* 259

See *Executor and Administrator* 1.

7. A testator gives a specified sum to each of his four daughters, to be paid to them one year after his decease, by one of his sons, to whom, (after giving an inconsiderable portion of the real estate to another son,) he devises all the residue and remainder of the real estate; and declares "The real estate above devised to my son is to be bound for the payment of the several sums, until paid to my several sons and daughters."

The claims of the legatees to charge the land for the payment of the legacies are resisted, on the ground that they have given to their brother, the devisee, receipts in full for the payment of their respective legacies.

It was *held*, that the legal effect of the receipt was to discharge the land of the lien, and standing without impeachment. it was a bar to the complainant's recovery in the suit. But that it was not conclusive between the parties—it was open to explanation. It was competent for the complainants to show that the money was not paid, or that the receipt was not in fact what it purported to be, "in full" for the legacy. That the principle was well settled, that the taking of an additional or other security of inferior or equal degree, would not *ipso facto* discharge a lien which attached by reason of an original security. It is always a question of intention, sometimes to be ascertained by the legal construction and effect of written instruments—sometimes by the circumstances of

the case. So where a receipt was given "in full for the legacy," and the money was not paid, but the devisee gave his promissory note, although the legal presumption, from the receipt "speaking for itself," was that the legatee *intended* to relinquish her lien upon the land, and *intended* to receive the note in satisfaction, yet this presumption could be overcome by positive testimony or by circumstances. And as it was not satisfactorily shown, that the legatee understood her rights, and was aware that the receipt would effect her legal rights under the will, the court would not give the effect to the receipt of destroying the lien upon the land. *Schaenck v. Arrowsmith.* 314

And this lien will have priority over a mortgage or judgment executed or obtained after the notes were given, even where the mortgage was received, and the debt for which judgment was obtained was contracted, under the supposition that the land was free of the liens. For neither the judgment creditor nor the mortgagee lose anything by any confidence they placed in the fact that the receipts were given. But they were mistaken as to the law. *Ibid.*

See *Mistake* 2.

8. A bequest in the following words: "I give and bequeath all the residue and remainder of my property, both in England and America, of every kind and description whatever, to W. J. T. *when* he arrives at the age of twenty-one years," conveys to the legatee a contingent interest only; and upon the death of the legatee before attaining the age of twenty-one, the property bequeathed goes to the next of kin of the testator. *Gifford v. Thorn.* 702

Where the time specified in the bequest is annexed to the payment only, the legacy vests immediately on the death of the testator, but where the time is annexed to the gift itself, the legacy does not vest until the legatee attains the age specified. *Ibid.*

The rule applies as well to bequests of the residue, as to particular legacies. *Ibid.*

But if it appears from any expression or direction contained in the will, or if it can be fairly deduced from the entire instrument, that the intention of the testator was that the legacy should vest immediately, such intention shall prevail. *Ibid.*

Where the interest of the legacy is directed to be paid to the legatee, until he receive the principal, or where the legacy is placed in the hands of trustees for the exclusive benefit of the legatee, until it is directed to be paid over, the legacy will be deemed vested. *Gifford v. Thorn.* 702

WITNESS.

In a suit by the administrator of a deceased obligee to foreclose a bond and mortgage, and the defence of payment set up, a brother of the deceased, entitled to a distributive share of his personal estate, is not a competent witness for the complainant.

To render him competent, he should release all his interest in the bond and mortgage, and the administrator should release him, or his interest in the estate, from all liability, on account of the costs of the suit.

Nor would he be competent to prove the execution of such releases where they are attested by a subscribing witness; a release of this kind must be regularly proved, the same as any other deed. *King v. King.* 44

Where the equity of redemption had been sold by the sheriff and no decree of foreclosure was necessary against the mortgagor, he was held to be a competent witness. *Brolasky v. Miller.* 807







